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CASE AND COMMENT

WARDS OF COURT—PREROGATIVE AND STATUTORY POWERS

THE question for decision by the Court of Appeal in *Re M.* (*An Infant*) [1961] 1 Ch. 328 was " whether on the facts of the case the terms of the Children Act, 1948, are by necessary implication such as to restrict the ancient prerogative of the Crown as *parens patriae* as regards infants," the prerogative power being now exercisable by ward of court procedure in the Chancery Division. An illegitimate child had been abandoned and was being cared for by a foster-mother by arrangement with the local authority. In 1957 the local authority vested in itself under section 2 of the Act the rights and powers of the infant's parent, and in 1960 demanded the child from the foster-mother on the ground that the boarding arrangement was not now in the child's best interests. On refusal habeas corpus was applied for; the foster-mother rejoined by making the infant a ward of court under section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949; and the present proceedings were for an order " de-warding " the infant.

At first instance Cross J. held that he had no jurisdiction to interpose his judgment on the question of the child's interests. " Parliament, as I read the Act, thought that children in the situation of this child ought to be taken care of by the local authority and that the local authority could be trusted to do the best for them. So long, therefore, as the local authority is acting within the powers given to it by the Act, this court, as I see it, has no right, let alone any duty, to inquire into the wisdom of its decisions:" [1961] 1 Ch. at p. 87.

Lord Evershed M.R. (Upjohn and Pearson L.JJ. concurring) agreed, but he was careful to point out the limitations of the Act's effect upon the prerogative power over infant wards. That power is only *pro tanto* taken away, not generally abolished. *E.g.*, the power to make an infant a ward under section 9 of the 1949 Act by applying

for an order is not affected. It is familiar practice that wardship proceedings are often taken for particular objects only, *e.g.*, directions as to education or control over an infant in relation to marriage or undesirable associations where parental control has failed, and in such cases the court does not make provision for custody and maintenance which will be left in the hands of unimpeachable parents. In such a case as this, therefore, an order de-warding the infant would merely conform with the ordinary practice of entrusting care and custody to the parent. The Master of the Rolls also reserved the court's duty to intervene where it is shown (as it was not here) that the local authority is acting " in some way in breach or in disregard of its statutory obligation." Thus a superintendent power is preserved, though the general discretion of the court may be qualified by statute and to that extent the prerogative power is cut down.

The following month Pennycuick J. had a similar, but, it would seem, a substantially more difficult case to decide, in *Re Baker* (*Infants*) [1961] 1 Ch. 303. There the mother of four children was in flagrant breach of her duty under the Education Act, 1944, to cause her children to receive full-time education and had indeed been twice convicted and fined by justices on this score. A third conviction for refusal to obey school attendance orders would have rendered her liable to imprisonment, but the local authority made her continued refusal the occasion of an application that the infants be made wards and that directions be given as to their education. The judge held that the Act had " by necessary implication restricted the inherent jurisdiction of the Sovereign as exercised by this court, to the extent that the court could not give any direction at variance with the Act." Such a conclusion appears quite unimpeachable, but the judge went further in holding that the effect of the Act was to preclude the court from lending its assistance to the local authority to enforce parental duties under the Act. He considered that such assistance under the inherent jurisdiction could only be given if the court could decide that the act to be done was for the benefit of the infant and that the Act removed discretion in this matter entirely into the hands of the local authority. He refused the argument that the court was bound to assume that the school attendance orders were for the benefit of the children concerned and that on that ground the court should interpose. The local authority therefore failed in the attempt to invoke the prerogative jurisdiction and were remitted to relying on the criminal sanctions in the Act itself.

Though the judge naturally relied on the earlier judgment of the Court of Appeal, this case does appear to take a further step. There

is an obvious difference between invoking the prerogative power to override a discretion which, on the construction of an Act of Parliament, is vested solely in a local authority, and invoking that power to assist a local authority acting validly in the exercise of such a discretion. Pennycuick J. was of course alive to this and conceded the force of the broad argument that the children were in jeopardy and that therefore the court ought to come to their aid. But he could not allow himself jurisdiction to give the court's assistance to school attendance orders as to the operation of which the court had no discretion at all. Nor could he make the assumption that particular orders must be for the benefit of particular children.

Is the arm of the prerogative all that short? Since " the infallible voices " have spoken in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* [1920] A.C. 508, there can be no legal doubt as to the efficacy of parliamentary amputations. But, at the risk of a muddled metaphor, we may say that in the last resort, in a case of construction, it is the court which wields the knife. In the absence of express reference in an Act, the prerogative is only affected by clear and necessary implication of ouster or restriction (Lindley L.J. in *Wheaton* v. *Maple & Co.* [1893] 3 Ch. 48, at p. 64). One cannot quarrel with the implication that the Act of 1944 excluded rival administration by the prerogative jurisdiction, but it is submitted that Parliament, if asked about this second case, might very well have answered (within the framework of the language in fact used by the Act) to the court: " Don't substitute your judgment for that of the local authority, but if there is no evidence of improper exercise of discretion, you may help it to do its job." In short, the learned judge made jurisdiction depend on the existence of a discretion and reasoned that the removal of the discretion was impliedly an abrogation of jurisdiction. It is hardly profitable to discuss whether jurisdiction depends on discretion or discretion on jurisdiction, but even if this way of putting the problem does not do justice to the judgment of the learned judge, it may be reasonably questioned whether, taking into account the presumption of non-repeal of the prerogative power without *necessary* implication, a self-denying ordinance of this nature does justice to the purpose of the legislation.

D. E. C. Yale.

ESTOPPEL—STATUTORY DISCRETION—ULTRA VIRES

Is a local authority estopped from exercising a statutory discretion by reason of a representation of fact made by an officer of the authority to an individual who has subsequently acted on the information given? This question is one of importance at a time of

complex government when it is often prudent for a subject to ask for the official view when planning a certain course of conduct. The Divisional Court chose to answer it in the negative in deciding *Southend-on-Sea Corporation* v. *Hodgson (Wickford) Ltd.* [1961] 2 W.L.R. 806.

Before buying premises which seemed suitable for use as a builder's yard, the respondent company asked the borough engineer, the chief planning officer of the local authority, whether planning permission was needed for the proposed use. His reply asserted without qualification that the land had an existing user right as a builder's yard and that permission was thus not needed. After buying the land and while using it as a builder's yard, the company received a letter from the town clerk stating that it now appeared that the land had not been used previously for that purpose, that permission was needed and that in view of the locality it would not be granted. The company persisted in their use and an enforcement notice was served on them requiring discontinuance. Appeal was taken against this to the justices, who held that the corporation were estopped by their engineer's letter from bringing evidence of the former use of the land. The Divisional Court, unanimously reversing this ruling, found that even assuming the letter amounted to a representation of fact (and it is immediately obvious that it embodied a vital inference of law) there was no estoppel. Estoppel could not prevent or hinder the performance of a statutory duty and the court could see no logical distinction as regards estoppel between a duty and a discretion. As Lord Parker C.J. said at p. 812, " in a case of discretion there is a duty under the statute to exercise a free and unhindered discretion."

Now it is clear that the normal rules of estoppel are seriously modified in their application to any body subject to the principle of *ultra vires*. By estoppel an authority cannot acquire a power which it does not have; it will not be estopped by having made a contract for a purpose beyond its powers (*e.g.*, *St. Mary's Vestry, Islington* v. *Hornsey Urban D.C.* [1900] 1 Ch. 695). Nor can it be estopped from performing a duty (*e.g.*, *Maritime Electric Co.* v. *General Dairies Ltd.* [1937] A.C. 610). In each of these situations the rule of law must prevail over the rule of evidence; any other result would strike at the heart of the *ultra vires* doctrine.

But in the Southend case, even if the land was being used for an unpermitted use, it was within the powers of the planning authority either to grant permission or at least to refrain from issuing an enforcement notice. Why did not the engineer's letter, when acted on by the company, bind the authority to exercise its powers on the basis of the land having an existing user as a builder's yard? The

sole judgment of the court asserts somewhat dogmatically the lack of distinction between duty and discretion, but there seems a preferable reason to be found in the existing rules of *ultra vires*.

This is simply that it is the planning authority on whom falls the duty to exercise the planning discretion; this may be delegated to a committee or even a sub-committee (see the First Schedule to the Act of 1947), but not to an officer. *Delegatus non potest delegare*. A planning officer advises on matters of planning policy but he bears no legal responsibility for the decision. The Southend justices considered that here one could assume that all necessary committees had been consulted. This is reminiscent of the principle first propounded, and then in relation to central government, by Denning J. in *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227, and repeated by him in the Court of Appeal subsequently, that " whenever government officers in their dealings with a subject take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they assume." But this was repudiated by the House of Lords in *Howell* v. *Falmouth Boat Construction Co.* [1951] A.C. 837, and the present Divisional Court did not trouble to deal with the point. In any event it could hardly stand so far as local authorities are concerned alongside the rule against delegation.

If the preferable reason for the present decision is the rule against delegation, there may yet be room for estoppel to govern the exercise of a statutory discretion wherever this would not conflict with the rules of *vires*, for example within a government department where the delegation rule does not apply (see *e.g.*, *Lewisham Borough* v. *Roberts* [1949] 2 K.B. 608). If an official in a government department makes a representation of fact which indicates that the Minister will exercise a statutory discretion in a particular way, why is not the Minister estopped from later exercising his discretion differently? The position seems the same even if by the internal practice of the department the matter should have been dealt with by a superior official. In the *Falmouth* case the House of Lords inevitably repudiated what may be called the Denning principle because as propounded it clashed with the rules of *ultra vires*. A qualified form of the principle, re-stated to allow for any question of *vires*, might well prove valuable.

The present decision may seem hard on the respondents, who relied on an apparently authoritative but in fact informal statement. To be protected they should have used the procedure under section 17 of the 1947 Act which provides for a formal determination by the planning authority as to whether permission is needed.

Even if a planning authority enjoys a privileged position in relation to estoppel by reason of the *ultra vires* rules, its position is not always so advantageous. In *Edwick* v. *Sunbury-on-Thames Urban D.C.* [1961] 3 W.L.R. 553, the statutory rules prescribing the time-limits within which planning applications are to be dealt with were held to be mandatory rather than directory; a planning refusal given out of time was consequently held to be void. Salmon J. approved a dictum of Lord Simonds that because the Act of 1947 was highly technical and encroached on private rights, " the court must insist on strict and rigid adherence to formalities " in the enforcement of planning control. One may question whether this attitude takes proper account of the public interest in effective town planning. In the recent Saffron Walden chalk-pit controversy, was not a large body of opinion advocating that planning control should be made more, not less, effective?

A. W. Bradley.

Criminal Law—Misprision of Felony

It is an offence to receive stolen goods knowing that they have been stolen, but it is not an offence for a person who has received stolen goods, whether guiltily or innocently, to sell them in fraud of the owner, knowing at the time of sale that they have been stolen. This is partly because of the limited definition of larceny at common law, which does not cover fraudulent misappropriation by possessors. It follows, therefore, that one who assists a receiver to dispose of the goods does not become guilty of a crime of misappropriation by the act of assistance. He is not a party to the receiving, because his assistance was not given at the time of the receiving. He is not an accessory after the fact to the receiving, unless his assistance was given by way of helping the receiver to escape justice. Merely to assist a person to reap the profits of his crime does not implicate a man as a party.

If we had a vigilant and active legislature, this gap in the law would have been filled long ago. Since this has not been done, prosecutors and judges have been thrown back on self-help, and the outcome is a revival of the ancient misdemeanour of misprision of felony: *Sykes* v. *D.P.P.* [1961] 3 W.L.R. 371 (H.L.). This is not to say that the crime is limited to the " contact man." According to the House of Lords, it applies to all those who fail to report a known felony to the police or to the magistrates. There are, it seems, no exceptions, not even those necessary in the public interest. It is true that Lord Denning suggested certain exceptions, but the other Law Lords pointedly refrained from expressing concurrence with them. Lord Morton expressed the opinion that the offence

would be committed even by one who *reasonably* thought that in the circumstances it was not his duty to inform the police of it. He thought that it was solely for the prosecuting authorities to decide whether a prosecution for misprision was " appropriate." Similarly, the only suggestion made by Lord Goddard was that the offence should be " sparingly prosecuted." This throws the onus on the police, or on the Director of Public Prosecutions, to decide which persons out of a large number of theoretical offenders should be brought before the courts. Although it has generally been assumed that the police in England have no powers of compulsory interrogation in respect of crime, it now turns out that they have, for if a person who knows of a felony refuses to answer their questions, he can be charged.

If the duty to disclose were limited to really grave crimes, and accompanied by suitable defences, it might be accepted as a valuable part of the law. But if there are no restrictions, as there seem not to be, it is intolerably wide. Brother, said Lord Denning, must inform against brother. Apparently a parent must inform against a child, and a child against parent. A lawyer, a psychiatrist, an obstetric surgeon or a priest must break professional confidences. Lord Denning thought that there was an exception here, since there may be a claim of right made in good faith that it is in the public interest not to disclose the crime. With respect, the expression " claim of right made in good faith " is out of place. It normally refers to a mistaken claim of legal right; but a lawyer who claims not to disclose his client's confidence is not resting his defence on a misapprehension of the law. He is asserting that the law privileges him from disclosing the confidence. It does so as a matter of the law of evidence; but doctors and priests are not even privileged in the law of evidence. In view of the silence of the other Law Lords on the question, it can only be supposed that Lord Denning was outvoted and that there is no such limitation upon the offence of misprision. Similarly, Lord Denning was apparently wrong in suggesting that an employer is entitled to give a thieving servant another chance before reporting him; and apparently the Master and Tutors of a College are bound to go to the police (just as a parent is) if they come to hear that an undergraduate has committed a petty theft.

In view of the breadth of this decision, it is curious to look at the authorities that their Lordships regarded as justifying it. They fell into three categories. (1) Medieval cases consisting of one decision on hue and cry (limited by its terms to those who were present when a felony was committed) and two dicta. (2) A series of pronouncements by writers, from Staunford onwards, who kept alive the

medieval law derived from hue and cry, although that procedure had become obsolete. (3) Apart from a few judicial references during the nineteenth century, which are little more than warnings of prosecution, we have nothing else in the way of authority till a series of cases commencing apparently with *Casserley* (1938). In such of these as were reported, the conviction for misprision was not followed by punishment, or else the punishment was awarded concurrently for misprision and on some other count. Moreover, there appears to have been no proper argument on the question whether the offence of misprision still existed—certainly nothing as full as that heard by the House of Lords.

The punishment for misprision is the same as that for all misdemeanours at common law: imprisonment or fine without limit. By statute, the maximum imprisonment for an accessory after the fact to any felony except murder is two years, but by charging him with misprision the limit is now removed. Lord Goddard suggested that an accessory after the fact should not be charged with misprision; but why should the fact that a man is guilty both of misprision and as accessory after give him the benefit of a lower maximum than if he had committed misprision only? In the same way, a receiver of stolen goods could now be charged with misprision. If it be said that this would be improper, having regard to the limit on the punishment of receivers, why is it that one who merely assists a receiver to dispose of the goods is subject to the unlimited punishment of misprision?

GLANVILLE WILLIAMS.

CRIMINAL LAW—CONSPIRACY TO CORRUPT PUBLIC MORALS

A PRINCIPLE of considerable importance but disquieting possibilities was established by the House of Lords in *Shaw* v. *Director of Public Prosecutions* [1961] 2 W.L.R. 897. The appellant had published a magazine called "Ladies Directory," which contained advertisements paid for by prostitutes and in which they offered their services, including both ordinary sexual intercourse and various perverse practices. The appellant was convicted at the Central Criminal Court on an indictment containing three counts: conspiracy to corrupt public morals; living on the earnings of prostitution contrary to section 30 of the Sexual Offences Act, 1956; and publishing an obscene article contrary to section 2 of the Obscene Publications Act, 1959. His appeal to the Court of Criminal Appeal was dismissed on all counts, but leave was given to appeal to the House of Lords on the first two counts. It is proposed to deal only with the first count in this note.

In confirming the appellant's conviction on the first count, the

House of Lords held (Lord Reid dissenting) that an offence of conspiracy to corrupt public morals is known to the common law. (Lord Morris of Borth-y-Gest and Lord Hodson concurred in the principal majority speeches of Viscount Simonds and Lord Tucker, and delivered brief supporting speeches.) Lord Tucker based his decision on this point upon the principle that a conspiracy to commit acts not in themselves criminal or tortious, but which are nevertheless " unlawful," is a crime. Lord Morris of Borth-y-Gest and Lord Hodson also relied upon this principle. The speech of Viscount Simonds, however, would seem to support the wider proposition that the corruption of public morals is in itself a crime. This was so held by the Court of Criminal Appeal in the present case (at p. 908). Lord Tucker expressly left this question open (at p. 936), and Lord Morris of Borth-y-Gest and Lord Hodson did not deal with it.

That a conspiracy to effect a public mischief is an established " head " of conspiracies to perform " unlawful " acts, was expressly or implicitly accepted by each of their Lordships. The difference of opinion was that while their Lordships who were in the majority held a conspiracy to corrupt public morals to be a recognised species or aspect of this general head (*e.g.*, Lord Tucker at p. 932), Lord Reid considered that in recognising an offence of conspiracy to corrupt public morals the House would be creating a new offence, or at least extending the offence of conspiracy to effect a public mischief to a new field by the creation of a new unlawful act (at pp. 924–925). While the majority of the House took a broad view of the authorities, placing emphasis upon the function of courts of law as *custodes morum*, Lord Reid considered that the cases cited did not establish a general offence of conspiring to corrupt public morals, but only more limited offences. His Lordship doubted the power of the courts to admit new kinds of criminal conspiracy, and considered that in any case such power should not be exercised so as to extend the notion of " public mischief " to new and controversial fields (at pp. 923–925).

The existence of a general crime of conspiracy to effect a public mischief is now confirmed by the highest authority, and the criminality of acts (not conspiracies) tending to the public mischief, affirmed by *R.* v. *Manley* [1933] 1 K.B. 529, has the support at least of the speech of Viscount Simonds. Further, it must now be accepted that an English court in its quality of *custos morum* may apply the conception of public mischief to " new combinations of circumstances " (Lord Hodson at p. 938). Not surprisingly, principles as accommodating as these have found prompt application: see *R.* v. *Quinn* [1961] 3 W.L.R. 611.

It is difficult not to regard the decision in *Shaw's* case as a serious blow to the principle *nullum crimen sine lege*, " one of the oldest and most enduring of all the ideas of Western civilisation " (Jerome Hall). This " principle of legality " means primarily that an act is criminal only if prohibited by a law in force at the time of its commission, and, at least in recent times, it has been possible to regard it as one of the fundamental principles of English criminal law. In the absence of a code the principle of legality has wanted authoritative formulation, and its scope has been little inquired into. On the Continent, where it is enshrined in the principal codes and has received a good deal of juristic attention, this principle is generally regarded as at least substantially curtailing the expansion of the field of criminal conduct by the courts. In particular, it is held to exclude the creation of new forms of criminal conduct by custom (including judicial custom), and the " analogous " extension of criminal liability to cases not covered by the code. This is so although the advantage of a contrary system of judicial discretion —the protection of society against injuries unforeseen by the lawgiver—is recognised by the Continental lawyer: the protection of the individual against tyranny is deemed a higher necessity. The Continental judge does, of course, enjoy some freedom in shaping the bounds of criminal conduct, by interpretation of the code; and this power is enlarged where the elements of criminal liability are expressed in wide and flexible terms—as notably in the Norwegian and Swiss penal codes. Clearly, under any system of law the courts must have a certain power to deal with cases which have not been specifically foreseen and provided for. The function of the principle of legality is to restrain this power within the limits necessary for the maintenance of a free society, and one of its minimum requirements is surely that the elements of a crime should not be defined with such generality as to leave appreciable doubt as to what conduct is criminal. Where the administration of justice relies upon the sentiments of jurymen, who may be expected to reflect as much the prejudices as the reasoned convictions of the generality of society, it seems especially desirable to insist upon the principle of legality. Without it we should have what Donnedieu de Vabres calls a " justice de circonstance, d'occasion, abandonnée à l'influence des passions individuelles."

C. C. Turpin.

MURDER—DRUNKENNESS—CRIMINAL RESPONSIBILITY

Ever since the decision of the House of Lords in *Director of Public Prosecutions* v. *Beard* [1920] A.C. 479, it has been accepted in English law that voluntary intoxication is not a defence to a

criminal charge unless it amounts to insanity within the meaning of the M'Naughten Rules (even if only temporary), or unless the intoxication has produced in the accused a mental or physical condition which renders him incapable of forming a " specific intention " where the existence of such an intention is essential to constitute the offence with which he has been charged. Now, in *Attorney-General for Northern Ireland* v. *Gallagher* [1961] 3 W.L.R. 619, the House has been afforded another opportunity of examining the difficult question of the interrelation between legal insanity and drunkenness and, while a number of problems remained unsolved, the case is one of very considerable importance. Although the defence of diminished responsibility does not exist in Northern Ireland, the issue of intoxication or alcoholism is one of great significance in connection with that special defence. In many of the early Scottish cases, indeed, the doctrine of diminished responsibility was developed in this context: *H.M. Advocate* v. *Dingwall* (1867) 5 Irv. 466; though now the tendency in Scotland would appear to be away from regarding drunkenness *simpliciter* as a ground of exemption: *Carraher* v. *H.M. Advocate*, 1946 J.C. 108; *H.M. Advocate* v. *MacLeod*, 1956 J.C. 20; and this view would appear to be shared by the English judiciary in applying the new statutory defence: *R.* v. *Di Duca*, *The Times*, May 27, 1959; *R.* v. *Dowdall*, *The Times*, January 22, 1960.

Gallagher's case came before the House on appeal from the Court of Criminal Appeal in Northern Ireland, by leave of the House, under the provisions of the Administration of Justice Act, 1960, s. 1. The Court of Criminal Appeal had quashed the conviction of the respondent, who had been found guilty of murdering his wife. At his trial, he had relied on the defence of insanity within the meaning of the M'Naughten Rules or, in the alternative, it was asserted on his behalf that he was by reason of intoxication incapable of forming the intent necessary to constitute the crime of murder.

The medical testimony as to the mental state of the respondent was inconclusive, but there was evidence that his was a psychopathic personality of an aggressive type, and that he was liable to attacks of episodic violence which could be stimulated by drinking. There was an extensive history of alcoholic addiction, accompanied by assaults on his wife, and at the time of the crime he was a temporary patient in a mental hospital. He was allowed out on parole and on the day in question he left hospital, bought a bottle of whisky and a knife, and went home. Later, he appeared at the house of a neighbour in a drunken condition and announced that he had killed his wife. When taken into custody by the police, he made a statement to the effect that he had made up his mind to kill

his wife several weeks earlier. Her dead body was discovered with multiple injuries and, nearby, an empty whisky bottle.

The main ground of appeal to the Court of Criminal Appeal had been that the trial judge had misdirected the jury in that he told them to apply the M'Naughten test not to the time when the respondent killed his wife but to the morning of that day before he started to drink. The court held that this had been a misdirection, quashed the conviction, and directed that a verdict of acquittal be entered. The Attorney-General for Northern Ireland then applied to the court for a certificate that a point of law of general public importance was involved and for leave to appeal to the House of Lords. The court certified that this point of law was involved: " Whether a person in a psychopathic condition which is quiescent may become insane (within the meaning of the rules in *M'Naughten's* case) as the result of the voluntary consumption by him of intoxicating liquor, if the effect of that intoxicating liquor is to bring about an explosive outburst in the course of a mental disease although the disease was not itself caused by intoxicating liquor." Leave to appeal, however, was refused, the court apparently taking the view that notwithstanding a ruling by the House of Lords in favour of the Crown, this still would not lead to a reversal of the decision of the Court of Criminal Appeal. This seems to have been based on the restrictive construction placed by the court on the relevant section of the Administration of Justice Act, 1960.

The principal argument submitted to the House by the Crown was based on the fact that, even if at the moment of killing the respondent was insane in the M'Naughten sense, and even if that was a consequence of his psychopathic state, nevertheless the defence of insanity was not available because before taking drink—when there was no defect in his reason—he had resolved to kill his wife, and any temporary derangement of his reason at the time of the killing was produced by his own voluntary intoxication. This embraces the proposition that insanity in the M'Naughten sense, involves two ingredients: (i) a " disease of the mind," and (ii) a " defect of reason," produced by that disease. An accused person who produces what Stephen J. in *R.* v. *Davis* (1881) 14 Cox 563 described as " a distinct disease caused by drinking, but differing from drunkenness," satisfies the test, for both ingredients are present. An accused person who is not already suffering from a " disease of the mind," and who does not produce it by taking drink, cannot claim exemption by reason of his resultant " defect of reason " alone; for that rational defect was produced by his self-induced drunkenness, not by mental disease, and so only one of the ingredients is present.

This argument seems to have commended itself to the House, for it was of the unanimous opinion that the decision of the Court of Criminal Appeal in Northern Ireland must be reversed. In the view of the House, there had been no misdirection by the trial judge, Lord MacDermott L.C.J. After dealing with the medical evidence as to the nature of the respondent's psychopathic condition, Lord Tucker said: " If the witnesses for the prosecution were right this disease does not even under provocation or the stimulus of alcohol produce anything more than lack of self-control. If this was the true nature of the disease from which the respondent was suffering . . . the defence of insanity fails at the outset. It was accordingly, in my view, not only permissible but right and proper for the Lord Chief Justice to direct the jury to consider the condition of the man at the time and to tell them in effect that the subsequent consumption of alcohol could not assist the defence of insanity. This does not mean that a man can never produce in himself a disease of the mind by the excessive consumption of alcohol, *e.g.*, delirium tremens, and in such a case the question will arise whether the disease so produced results in insanity within the M'Naughten Rules. This was not such a case. It was not suggested that the respondent became an aggressive psychopath as a consequence of the consumption of alcohol. He was, it was said, an aggressive psychopath liable to outbursts of violence on provocation or under the influence of alcohol or any other exciting cause." Lord Morris of Borth-y-Gest expressed the same view even more succinctly. When dealing with the portion of the trial judge's charge which had been impugned, he said that the latter was reminding the jury that for the M'Naughten Rules to apply, " the defect of reason producing a condition of either not knowing the nature and quality of the act being done or of not knowing that it was wrong must be the result of a disease of the mind and not the result of being under the influence of drink. The learned Lord Chief Justice was pointing the difference between the possible case where a psychopath does something because he is drunk and the possible case where a psychopath does something because he is a psychopath."

Lord Denning in the course of his speech summarised the law with regard to the effect of drunkenness on criminal responsibility, and reached the conclusion that the respondent's premeditated intention to kill his wife prevented him from relying on drunkenness as a defence. He also emphasised the principle, clearly laid down in *Beard's Case* [1920] A.C. 479, at pp. 500–501, that temporary insanity, even though induced by drinking, may fall within the M'Naughten Rules. This is a salutary reminder, for there has been a tendency to overlook it. Thus, in *R.* v. *Di Duca*, *The Times*,

May 27, 1959, the Court of Criminal Appeal seemed to doubt whether the effect of alcohol was relevant to the statutory defence of diminished responsibility, as constituting an injury affecting the mind within the meaning of the Homicide Act, 1957, s. 2 (1). In addition, Lord Denning drew attention to the fact that had this statutory defence been available in Northern Ireland, a psychopath such as the respondent might have been able to raise it. This accords with the cases under the Homicide Act, such as *R.* v. *Spriggs* [1958] 1 Q.B. 270, where the psychopathic personality of the accused has been in issue.

Another, procedural, argument addressed to the House by the respondent, which was accepted by the Court of Criminal Appeal in Northern Ireland, was that under the provisions of the Administration of Justice Act, 1960, the House had no power to decide any question beyond that set out in the certificate, and so could not vary the decision of the court below. This was also rejected, the House holding that on the proper construction of section 1 of the Act there was jurisdiction to dispose not merely of the question certified but of the appeal as a whole.

Finally, reference was made to what Lord Tucker described as the " absurd and disastrous consequences " which can result from the inability of courts of criminal appeal in the United Kingdom to order a new trial in an appropriate case. This view was shared by Lord Reid, and Lord Goddard expressed himself equally strongly in the same sense. The arguments which commended themselves to the majority of the members of the Departmental Committee on New Trials, in 1954, have it would seem, left at least one member of that committee unconvinced, and, indeed, experience in other places (*e.g.*, the Irish Republic; *cf.* 71 L.Q.R. 26) is a clear refutation of those arguments. *Gallagher's* case is a striking example of the need for this reform, for if it had not been for the fortuitous circumstance that the Court of Criminal Appeal in Northern Ireland had been able to certify that a question of general public importance was involved, then, in the words of Lord Goddard, " a man who had brutally murdered his wife and whom a jury had declined to find was insane would have to be set at liberty free from any consequence of his crime."

V. T. H. Delany.

CONTRACT—C.I.F.—FRUSTRATION—CLOSURE OF SUEZ CANAL

One of the cases (see [1960] C.L.J. 10, 149) concerning the effect of the closure of the Suez Canal upon contracts for the sale of groundnuts c.i.f. from the Sudan to ports in Europe—*Tsakiroglou & Co.*

Ltd. v. *Noblee Thorl G.m.b.H.*—has now completed its predestined journey to the House of Lords: [1961] 2 W.L.R. 633. As expected, the view of the Court of Appeal was confirmed, and it was held that the closure did not on the particular facts of the contract operate to frustrate the contract of sale. One additional item of interest on the price variations involved appears from the report: freight from Port Sudan to Hamburg via Suez ruling before closure on November 2, 1956, was about £7 10s. per ton; at the end of December 1956, after various increases, it was £15 per ton via the Cape. And the buyer (respondent) after repudiation was able at Hamburg to buy against the sellers on January 15, 1957, groundnuts at £68 10s. per ton, the contract price having been £50.

Little by way of comment is now called for. The decision is in line with authority, and it well exemplifies the strictness of the English law: the performance of a contract is not excused merely by a change of circumstance, in spite of the severity of the commercial dislocation created by that change. As such, the *Tsakiroglou* case is only a modern reaffirmation of the much more spectacular *Larrinaga Case* (1923) 29 Com.Cas. 1, to which indeed Viscount Simonds referred.

The student should however note that the decision itself gives no warrant for the very remarkable doubt expressed by Viscount Simonds who said (pp. 639–640), evidently *obiter*, "It does not automatically follow that because one term of a contract, for example, that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated. . . . In the instant case, for example, the impossibility of the route via Suez, *if that were assumed to be the implied contractual obligation*, would not necessarily spell the frustration of the contract." (Italics supplied.) The proposition may perhaps be saved by an insistence upon the adverbs "automatically" and "necessarily"; but in fact Tsakiroglou's contract was not frustrated, because the Suez route was held not to be contractually obligatory. The student at any rate should have no doubt that if the c.i.f. contract had specified "via Suez," the closure would have frustrated the contract—see *e.g.*, *Nickoll & Knight* v. *Ashton Edridge & Co.* [1901] 2 K.B. 126.

The student should also note that, though the *Sidermar* case (see [1960] C.L.J. 149) was distinguished as concerning a charterparty, nevertheless the holding in that case that the route via Suez—which had not been specified—was expressly or impliedly indicated (and the contract therefore frustrated by the closure) remains one of much doubt, and should be regarded as depending upon the very special circumstances there arising.

C. J. Hamson.

CONTRACT—FRUSTRATION—LANGUAGE

THE main lesson for students of the law of contract in *Hongkong Fir Shipping Co., Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1961] 2 W.L.R. 716 concerns the use of words. Incidentally, one can also find in it a clue to one of the sources of the modern doctrine of frustration.

The case arose out of a contract for the time charter of a ship. The owners covenanted, *inter alia*, that she was in every way fitted for ordinary cargo service, and also that they would maintain her in a thoroughly efficient state in hull and machinery during service, but in breach of these undertakings they sent her to sea with an inadequate and incompetent engine-room staff. In consequence, during her first voyage under the charterparty she suffered from a series of engine breakdowns and was off hire for several weeks in all, undergoing repairs. When she reached Japan, an extensive overhaul taking something like fifteen weeks was found to be necessary. The charterers thereupon wrote to the owners repudiating the charter. This action was brought by the owners claiming that the repudiation was wrongful, and asking for damages.

Translated from the language of shipping law to that of general contract, the decision of Salmon J. may be summarised in four propositions:

> (1) The owners' undertaking as to seaworthiness and maintenance was here, as it ordinarily is in charterparties, not a condition but a warranty.
>
> (2) Accordingly, a breach of this undertaking gave the charterers a right to damages but did not entitle them to repudiate.
>
> (3) Shipping law, however, allows an exception to these rules where *inordinate* delay (also called delay for an " unreasonable " or " frustrating " time) is caused, or is expected to be caused, by a breach of the undertaking. The courts will then treat the default as a breach of *condition* and relieve the charterers altogether from their executory obligations.
>
> (4) The delay in this case was not so great as to be covered by proposition (3); the charterers' repudiation was therefore wrongful, and the owners were entitled to damages.

The decision lays down no new principle, either of maritime law or of general contract. But the language of the judgment may prove puzzling unless the student bears in mind that, however desirable it may be for teaching purposes to have terms with precisely defined meanings, his teachers and textbooks in their quest for clarity often place undue restrictions on the use of what are, after all, ordinary words of the English language.

For example, consider the word " condition " in the following passage of the judgment (p. 726): " . . . a breach of the condition

to maintain the vessel in a thoroughly efficient state cannot by itself entitle the charterers to rescind." " Condition " is not used here in its modern technical sense as the antithesis of warranty; in fact, here it obviously *means* a warranty. The learned judge is simply giving the word an everyday meaning, equivalent to " term " or " provision," without special regard to its legal effect.

Again, some textbooks distinguish a condition (in the technical sense just mentioned) from a " condition precedent," and define the latter as an event which must happen before a contract becomes operative—as in *Pym* v. *Campbell* (1856) 6 E. & B. 370. It may be convenient, but it is wrong, to give the expression such a limited meaning. Rights and duties, as well as whole contracts, may become operative on the occurrence of an event. The major contractual promises which today we call conditions acquired that name simply because they have in them an element of condition precedent. Unless the promise is performed, some or all of the promisor's rights and the promisee's obligations do not arise. For instance, in a charterparty, the charterer cannot be required to provide and load a cargo until the ship-owner has delivered the ship. Here it is both good English and good law to say that performance of the owner's promise is a condition precedent to the charterer's obligations to provide and load a cargo. Salmon J. several times uses the expression " condition precedent " in this way (pp. 724–725).

The most interesting example of divergence from textbook practice is, however, the frequent reference in the judgment to " frustration " of the charter. In order to entitle the charterers to repudiate under proposition (3) above, it is said, the owners' delay must be so great as to " frustrate the commercial purpose of the charter." Most writers would condemn the use of expressions of frustration in this context for, they would say, the modern doctrine of frustration is applicable only where impossibility has come about without the fault of either party. If a party is at fault, as was the owner here, there is simply a breach of contract. Yet this use of the expression " frustration " is sanctioned by a line of cases going back more than a century and is, in fact, older than the modern doctrine of frustration. Devlin J. in *Universal Cargo Carriers Corporation* v. *Citati* [1957] 2 Q.B. 401 explained the connection. He said (pp. 430–431):

> " The doctrine that a commercial contract is dissolved upon the happening of a supervening event which frustrates the object of the venture now plays so important a part in the law that a reference to frustration is likely to be taken as a reference to that doctrine. But the term was in use in relation to breach of

> contract well before the doctrine was declared in 1870 or thereabouts. For some time before that the courts had been using the yardstick of frustration for the measurement of delay caused by breach of contract. It was because the same yardstick was used for the measurement of delay caused by the supervening event that the new doctrine got its name of frustration. . . . To bring a contract to an end by breach of warranty there had to be a failure of consideration, that is to say, the breach had to be such as to deprive the plaintiff in effect of the benefit of his contract. Various metaphors came into use for describing the character of such a breach, such as ' going to the whole root and consideration of the contract ' and ' frustrating the object of the voyage '."

It is to be regretted that the learned judge does not make it clear that he is not concerned in this case with the modern doctrine of frustration. Indeed, in the concluding paragraphs of the judgment, there appears to be an assumption that, because the " yardstick " is the same, the doctrines are the same—which is, of course, not the case.

Those who wish to study further the history of the two types of frustration will find a full account in McElroy and Williams, *Impossibility of Performance* (Cambridge, 1941), Chapter VI.

L. S. Sealy.

HIRE-PURCHASE—THREE PARTY TRANSACTION—RELATIONSHIP OF PARTIES

The modern vogue for hire-purchase is presenting the courts with a succession of problems. Not a few of these stem from the standard practice of conducting the transaction through the medium of a third party financier, and their solution accordingly calls for careful analysis of the legal relationship between hirer, dealer and finance company.

Such analysis was the key to the dilemma posed by *Campbell Discount Co. Ltd.* v. *Gall* [1961] 1 Q.B. 431. Gall had agreed with one Boodof, a dealer in secondhand cars, to buy a Vauxhall for £265 on hire-purchase terms. Gall paid Boodof a deposit of £65 and the remaining £200 was to be paid by certain instalments. Boodof produced a form of hire-purchase contract that had been supplied to him by the Campbell Discount Co. and Gall signed the document, leaving Boodof to fill in the blanks. But Boodof fraudulently (or possibly mistakenly) inserted a false purchase price of £325 and false repayment provisions. On receiving the document the Campbell Discount Co. accepted the offer in good faith and paid Boodof for the car, being credited with the deposit received by him from Gall. The car was delivered to Gall, but he saw that the price and

instalments as stated in the copy of the contract sent to him were too high. He thereupon complained (so he later alleged) to the company, and he made no use of the car and paid no instalments. The company eventually retook the car and sued Gall for four months' instalments. Gall counterclaimed for return of the deposit.

Clearly the position of Boodof *vis-à-vis* the two parties was of critical importance. Each side claimed he was acting as the other side's agent. If he were the company's agent then the company could not avail themselves of his false entries, and parol evidence would be admissible (as the court held) to contradict the written document and show that the true contract made was for less than £300 and thus within the Hire-Purchase Acts, 1938 and 1954. The Acts would render that contract unenforceable for failure to satisfy certain requirements. Further, the company would have to refund the deposit as it would have been received on their behalf. If on the other hand the dealer were the hirer's agent then (so the company argued) the dealer was acting within his ostensible authority in completing the form as he did, and its terms would bind the hirer.

The Court of Appeal unanimously rejected both contentions, holding that the dealer was not the agent either of the company or of the hirer. Several factors admittedly might have suggested that the dealer was the company's agent: he fixed the price and rate of repayment, he received the deposit, he had been supplied by the company with a stock of their forms, and he was paid a commission by them. But as Holroyd Pearce L.J. pointed out in the leading judgment, it was in furtherance of his *own* business that the dealer, equally with the hirer, was concerned to bring the company into the deal. Neither was he the hirer's agent, for it was in furtherance of his own interests that he completed and transmitted the form signed by the hirer. Nor could it be maintained that the dealer had been clothed by the hirer with any apparent authority which had misled the company, the situation here being clearly distinguishable from that in *Eastern Distributors Ltd.* v. *Goldring* [1957] 2 Q.B. 600.

It was also clear that the hirer was not estopped by his negligence from denying the truth of the document which he had signed and allowed the dealer to complete, as it had been decided in *Wilson and Meeson* v. *Pickering* [1946] K.B. 422 (C.A.) that only when a negotiable instrument is signed in blank will such an estoppel arise.

Consequently no contract was ever made between the parties, and the company could not recover. Nor could the counterclaim succeed as the hirer had paid his deposit not to an agent of the company but to an independent dealer from whom alone it was recoverable. So this was to some extent, as Harman L.J. observed,

" a drawn battle "; and justice was thereby broadly done between the two parties, for the company were left with a car which had depreciated, but for which they had paid a price reduced by £65 (the amount of the deposit with which the dealer had credited them) and the hirer, by failing to recover this deposit, was appropriately penalised for his carelessness.

Thus the decision scarcely invites criticism. Yet suppose the company had in fact been informed of the mistake in the contract as soon as the car was delivered and had at once retaken it. They would then have found themselves in possession of a car which had not depreciated, but which they had bought for a price reduced by £65 (the price itself, although perhaps inflated, being one which they had been willing to accept). Their immunity then from liability to return the £65 to the hirer would have resulted in their making a somewhat unmerited gain.

It is suggested that the law of hire-purchase can still at times bear hardly on the customer. Inevitably he tends to assume that the dealer who produces a finance company's form is that company's agent, and the law may be failing to fulfil reasonable expectations when it declares that he is not. There is surely a case for providing by statute that a dealer who arranges such a hire-purchase transaction should be deemed to be the company's agent. A person in Gall's position would then be able to recover his deposit from the company. Moreover the company would incur responsibility for any misrepresentations made by the dealer and their contract with the hirer would consequently be subject to rescission. A disadvantage, however, would be that the hirer's contractual remedies against the dealer, as established by *Andrews* v. *Hopkinson* [1957] 1 Q.B. 229, would disappear, though the dealer's liability in tort would remain.

J. C. Hall.

HIRE-PURCHASE—PENALTIES—FREEDOM OF CONTRACT

In *Campbell Discount Co. Ltd.* v. *Bridge* [1961] 2 W.L.R. 596, the Court of Appeal faced the characteristic problem of our time. A hire-purchaser of a Dormobile, who had paid the down payment and first instalment, found that he was prevented by " unforeseen personal circumstances " from paying any more. Instead of getting into arrears, he wrote at once to terminate the hiring, as the contract allowed, and he returned the car. The contract also provided, however, that in the event of termination, the hirer should pay to the company arrears of instalments with interest and, as " compensation for depreciation," such further sum as was necessary to make the rentals paid or payable equal to two-thirds of the price of £482.

When sued for such a sum, the hirer alleged that it was a penalty and not recoverable; and that, in any case, the court should in its equitable jurisdiction relieve him from liability.

The court did not finally decide whether it thought the sum " penal " in amount, under the principles of *Dunlop Pneumatic Tyre Ltd.* v. *New Garage Ltd.* [1915] A.C. 79—although Holroyd Pearce L.J. seemed to think it was not: pp. 602–603. The law of penalties, their Lordships held, was not applicable at all. It was relevant when a sum was payable on breach. But here there had been no breach and the sum was " the price of the hirer's right to terminate." No question of penalty could arise. Furthermore, there was nothing unconscionable in the bargain or its results which allowed for the intervention of the court on any recognised principle of equity.

The law now appears to be as follows:

i. Where X commits a breach of contract Y cannot sue for a " penalty " (as opposed to liquidated damages) payable under the contract. That remains the case even if the same sum is also payable under the contract on events which are not breaches: *Cooden Engineering* v. *Stanford* [1953] 1 Q.B. 86 (Jenkins L.J. dissenting). Y can ignore the penalty and sue for actual loss caused by the breach: *Wall* v. *Rederiaktiebolaget Luggude* [1915] 3 K.B. 66; see too *Yeoman Credit Ltd.* v. *Waragowski* [1961] 1 W.L.R. 1124 (C.A.).

ii. Where X commits a breach and the contract stipulates that sums already paid to Y are thereby forfeited, the court can (probably) grant relief to X (not merely as to time but for recovery of the money) if the sums are penal in amount and the circumstances make forfeiture unconscionable: Somervell and Denning L.JJ., *obiter*, *Stockloser* v. *Johnson* [1954] 1 Q.B. 476 (Romer L.J. dissenting).

iii. Where X commits no breach, Y can recover a sum payable under the contract on an event which X brings about, even if it might otherwise be penal in amount: *Alder* v. *Moore* [1961] 2 W.L.R. 426 (Devlin L.J. dissenting, most persuasively on construction). The same is true where the " event " is the exercise by X of an option to terminate the contract; and the court cannot intervene on equitable grounds: *Campbell Discount* v. *Bridge*, *supra*. (*Quaere*: can the court intervene to prevent Y from recovering a penal sum payable to him under the contract on a notice to terminate given by *him*, when X is not in breach?)

The law in this state is uncertain, inelegant and unjust. The present case adds to the uncertainty by casting doubt on the majority in the *Cooden* case (Harman L.J.) and by leaving in doubt

the standing of the dicta in *Stockloser's* case. Moreover, their Lordships felt themselves bound by *Associated Distributors* v. *Hall* [1938] 2 K.B. 83; but in that case the point about penalties was conceded by counsel ([1938] 1 All E.R. p. 512) and the reasoning in it, based on cases which have since been held to be wrong (Denning L.J. *Landom Trust* v. *Hurrell* [1955] 1 All E.R. p. 842), conflicts in many ways with the *Cooden* case. Lastly, injustice is not too strong a word for a case which puts the man who keeps his contract into a weaker position than the man who commits a breach. If the defendant had here waited until he was in arrears, he could have raised the penalty point. In order to raise it, he did try to prove a breach in his manner of returning the car, but in this he failed. It is an odd law of contract which punishes a plaintiff for failing to prove his own breach !

But the reason for this oddity is also the measure of the importance of this case. The choice for the court was a critical one. An extension of the law here would have led inevitably into new general equitable remedies, and into a new break with the old rules of " freedom of contract," with which the penalty principle has always been in conflict. Holroyd Pearce L.J., who regretted the result of the case, said: " It would be a novel extension for the law to interfere on equitable grounds with ordinary contracts freely entered into by persons under no duress or mistake merely on the ground that . . . they have turned out harshly for parties who . . . were compelled by circumstances to abandon their contracts " (p. 604). And Harman L.J., although he was " oppressed " by an " uneasy feeling " that the " law as it stands is not satisfactory," firmly adhered to the principle that " the Chancery mends no man's bargain," and deprecated the efforts of those who would have it otherwise and " invent " new equities, saying: " I think Lord Denning is one of them " (p. 605).

The most interesting feature of the judgments is this refusal to innovate. In other areas of the common law—criminal conspiracy, murder, industrial law—judges have recently shown a tendency to fashion new principles out of the old. In contract, there are cases where the court can " mend the bargain "; but to do so here would, the court saw, have been a leap into a wholly new policy. But the case also illustrates how a narrow adherence to precedent at the point of choice is no less a *choice* of policy by the judges, and that, in fact, at such points policy cannot be avoided. The result of the present case raises the question whether the precepts of " freely " negotiated contract utilised by their Lordships are apt to deal with a society in which finance companies dictate terms of " agreements " to consumers, standard exemptions and all, to the tune of

a total hire-purchase debt of some £900 million. How far can, should, or do judges take account of such facts? English jurisprudence might profitably ask more often after the sociology of creative judicial activity. When do the judges innovate, and why?

But novelty is of itself no virtue; it depends what you " invent "; and those who are unhappy with some trends in current judicial innovation will probably prefer a remedy through legislation. Both Holroyd Pearce and Harman L.JJ. thought that, if a remedy was needed here, that was the only way to effect it. The former pointed out that the Hire-Purchase Acts, 1938 and 1954, could not apply here since the price exceeded the maximum £300. It is surely time that a new Hire-Purchase Act was enacted (i) raising the figures below which the Act applies (at present most sales of cars are excluded); (ii) extending the compulsory implied obligations so as to prevent unscrupulous exemption clauses (s. 8 of the 1938 Act does not go far enough); and (iii) strengthening the powers of the court to prevent the extraction of unconscionable sums on termination, and otherwise to protect the consumer by widening sections 11–15. Another useful short-term measure would be an amendment of the Advertisements (Hire-Purchase) Act, 1957, to demand that an intelligible account of such " compensation " clauses as the one in this case should appear (in readable print) on all advertisements for the sale of goods by hire-purchase or credit-sale.

These judgments, in fact, suggest that the future of the law of hire purchase and sale may lie not with equitable innovations by the courts, but with statutory regulation of particular *types* of contract, leading perhaps, as Mr. Sales has suggested (16 M.L.R. 318), to sets of standardised imposed terms. If so, perhaps their Lordships should be applauded for saying in effect that it is the job, not of the courts, but of the legislature to effect such fundamental changes as that. Certainly such a change would shift the law away from myths of " freedom " of contract into the more real freedoms of protected status.

K. W. Wedderburn.

HIRE-PURCHASE—FUNDAMENTAL BREACH

In *Yeoman Credit, Ltd.* v. *Apps* [1961] 3 W.L.R. 94 the Court of Appeal has substantially extended the doctrine of fundamental breach of contract in a way that will puzzle lawyers, worry hire-purchase finance companies and give hope of a remedy against such companies to hirers who receive grossly defective goods from dealers with whom they can prove no collateral contract or who are not

worth suing. Further, fundamental breach is distinguished from total failure of consideration.

The plaintiff finance company let on hire-purchase to the defendant hirer a 1954 Ford Zephyr car. The agreement contained the inevitable exclusion clause stating that: "No warranty whatsoever is given by the owner as to the age, state or quality of the goods or as to fitness for any purpose and any implied warranties and conditions are also hereby expressly excluded . . . " The hire-purchase price (£574) made the Hire-Purchase Acts, 1938 and 1954, inapplicable. The transaction had been arranged by a car dealer, who took the hirer for a short trial run when it was too dark to examine the car. When the hirer remarked on the cracked windows, the dealer induced him to sign the hire-purchase agreement and pay a deposit by promising to overhaul the car and replace the defective windows and tyres. In fact, however, all he did was to leave it outside the hirer's house one night. It proved utterly unroadworthy due to seriously defective brakes, clutch and steering mechanism, once taking an hour and a half to go four miles. On complaining to the finance company, the hirer was simply referred to the dealer. After paying three instalments he defaulted, so the company terminated the hiring, towed the car away and sold it as it was for £210. They then claimed arrears of instalments and damages, whilst the hirer counterclaimed for the deposit and instalments already paid, on the ground of total failure of consideration. The county court dismissed the company's claim, holding that they were in breach of a fundamental term that the car should be roadworthy and so could not rely on the exclusion clause. The hirer was awarded the £170 already paid as on a total failure of consideration. The company appealed.

The Court of Appeal, after reviewing the cases, first held that in contracts for hire or hire-purchase of a specific chattel a condition will ordinarily be implied at common law that it should be reasonably fit for the purpose for which it is let, except where the defect is apparent to the hirer and he does not rely on the owner's skill or judgment. Here such a term was not excluded by the hirer's reliance on the dealer's promise to overhaul the car, since the defects were latent and anyway no bargain between the dealer and the hirer could affect the company's obligation to the hirer. Nor did the exclusion clause oust such a condition since, in the words of Lord Dunedin in *Pollock & Co.* v. *Macrae*, 1922 S.C.(H.L.) 192, 200, the car suffered from " such a congeries of defects as to destroy the workable character of the machine," which amounted to breach of a " fundamental *condition* " that the company should provide a " functioning car which could be used on the roads." Lastly, there

was no total failure of consideration because the hirer had approbated the contract by paying three instalments and keeping the car for several months during which he had had the lawful, though admittedly highly unsatisfactory, use of it. Accordingly the hirer was entitled only to damages (£100) and must pay the further instalment which fell due before he in fact repudiated the agreement —as he was entitled to do so long as the company remained in breach of a fundamental term of a *continuing* contract.

Earlier cases had established that a party guilty of a " fundamental breach," or breach of a " fundamental term," of a contract cannot escape liability by reliance on an exclusion clause: see A. G. Guest in 77 L.Q.R. 98–118. The implication was that a fundamental term was something narrower and more essential than an ordinary condition of a contract: see *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co.* [1953] 1 W.L.R. 1468, 1470. In sale and hire-purchase the tendency has accordingly been to look for terms which are by their very nature fundamental: *e.g.*, that the goods supplied shall be the contract goods and not something " different in kind "—not beans for peas; or, apparently, that the seller or person letting goods on hire-purchase has a good title to them (*Rowland* v. *Divall* [1923] 2 K.B. 500; *Warman* v. *Southern Counties Car Finance Corporation, Ltd.* [1949] 2 K.B. 576). In *Karsales (Harrow), Ltd.* v. *Wallis* [1956] 1 W.L.R. 936 the fundamental breach seemed to be the physical alteration of the car between contract and delivery, which made it " different in kind " from that contracted for. But in the *Apps* case Holroyd Pearce L.J. rejected that interpretation of *Karsales* and regarded the fundamental breach as the " delivery of something that could not properly constitute compliance with a contract to hire a car." In other words the fundamental term there, as in the *Apps* case, was fitness for the purpose for which the car was let. The correspondence between the fundamental terms in these cases and the ordinary conditions implied by sections 12–14 of the Sale of Goods Act, 1893, and section 8 of the Hire-Purchase Act, 1938 (unless excluded as those Acts expressly permit), is evidently no coincidence. Apparently the difference between what is now being treated as a fundamental term (or fundamental *condition* as it is called in the *Apps* case) and an ordinary condition lies not in their content, which may be identical, but in the degree of default. For Holroyd Pearce L.J. said (p. 104):

> " Whether there has been a breach of a fundamental condition of the agreement is a question of degree depending on the facts. Such a breach is different in weight and gravity from breaches of condition which could come within the exemption."

And Davies L.J. suggested that the condition of fitness implied by section 8 of the Hire-Purchase Act, 1938, had been inserted merely to give hirers a remedy for defects less than those constituting a fundamental breach of the contract (p. 108). But, with respect, the concept of a condition which can be successfully excluded from a contract unless it is gravely broken is not easy to understand. It seems to derive from the now accepted method of construing contracts, including implied terms, without reference to exclusion clauses and then treating the latter as merely excluding *liability for breach* of implied terms (if gross), even if they purport to exclude those terms themselves.

The judgments also indicate that a fundamental breach does not necessarily involve a total failure of consideration. It did so in *Rowland* v. *Divall* and *Warman's* case because the buyer or hirer was never given *lawful* possession of the goods. But where, as here, he receives lawful possession despite the fundamental breach, it apparently depends on what he does. If he repudiates the contract and rejects the goods, he may recover all he has paid on grounds of total failure of consideration. But if he approbates the contract and keeps the goods, there is no total failure and he may only recover damages. For in contracts of sale section 11 (1) (*c*) of the Sale of Goods Act, 1893, apparently compels fundamental, as well as ordinary, conditions to be treated as warranties *ex post facto*; *cf. Pollock & Co.* v. *Macrae*, *supra*. And in continuing contracts, like hire-purchase, though the right to reject remains so long as the fundamental breach continues, the hirer must pay all sums falling due before he actually rejects, and may only recover damages himself. This seems a just and practical solution provided the assessment of damages recognises that the deposit and periodic instalments represent much more than would be paid merely to hire goods without the option of purchase.

The case suggests that attempts to " shrink the core of the contract " by limiting the express undertakings to the minimum and excluding all ordinary conditions normally implied by common law or statute are likely to be met, if the default or defects are gross enough, by the courts expanding that " core " by implying whatever comparable " fundamental conditions " they think fit. (Contrast the reluctance similarly to mitigate the rigours of express minimum-payment clauses in hire-purchase agreements, as in *Campbell Discount Co., Ltd.* v. *Bridge* [1961] 1 Q.B. 445 (C.A.), noted at p. 156, *ante*.) But is this the best way to give much-needed protection to consumers against manufacturers and traders who have lost faith in the quality of their products and services and

have taken refuge behind the standard-form contract with its indiscriminate exclusion clauses? Will not the illogicalities of the artificial distinction between ordinary and fundamental conditions lead to prolonged uncertainty? It would seem better to modernise the Sale of Goods Act and the Hire-Purchase Acts by, *inter alia*, prohibiting exclusion of their implied terms. Indeed, the whole law of hire-purchase seems ripe for comprehensive review.

J. W. A. Thornely.

HUSBAND AND WIFE—GIFT—EQUITABLE ASSIGNMENT

A HIRE-PURCHASE transaction caused unexpected complications in *Spellman* v. *Spellman* [1961] 1 W.L.R. 921 (C.A.). A husband and wife hoped to prevent the breakdown of their marriage by the acquisition of a car for the wife. The husband obtained the car on hire-purchase in his own name but entered the wife's name in the registration book. The hire-purchase agreement prohibited the husband from parting with possession of the car or assigning the benefit of the agreement. Unhappily the husband soon left home with the car, leaving the wife, who had never driven it due to an unfamiliar gear-lever, with the registration book. The husband then applied under section 17 of the Married Women's Property Act, 1882, for a declaration whether or not he held his interest in the car and the hire-purchase agreement on trust for the wife.

There might have been a legal gift of the car itself had the husband bought it outright. (But would there have been a sufficient delivery on these facts? *Cf. Valier* v. *Wright and Bull, Ltd.* (1917) 33 T.L.R. 366.) But as a mere hirer he had no legal title to give. As for the benefit of the hire-purchase agreement, Danckwerts L.J., with whom Ormerod L.J. briefly agreed, held that this, being a chose in action, was property and so a fit subject for proceedings under section 17. He considered whether there might have been an equitable assignment of it, but concluded that putting the wife's name in the registration book, though evidence of an intention to give the car, did not suffice for an equitable assignment of the husband's rights. Finally the court unanimously held that the wife acquired no rights either in the car or the benefit of the agreement since the transaction was a purely domestic arrangement not intended to create legal relationships between the parties. Presumably this refers to contractual relationships, since two members of the court were clearly willing to contemplate proprietary relationships arising from an equitable assignment had one been established by the evidence.

Divergent views were expressed on the assignability of a hire-purchaser's rights. Danckwerts L.J. cited *Re Turcan* (1888) 40

Ch.D. 5 (C.A.) as establishing that " the fact that there is a prohibition in the document creating the chose in action against assignment is not necessarily fatal " to a claim that there has been an equitable assignment. Willmer L.J., however, was " not persuaded that it is possible to overlook the specific provision of the agreement whereby the hirer . . . has covenanted that he will not assign or charge the goods or the benefit of the agreement," since a declaration that the husband held on trust for the wife would amount to a declaration that he had broken his covenant.

The view of Willmer L.J. that the parties can themselves expressly make the benefit of a contract unassignable is generally accepted by the textbooks (Halsbury's *Laws*, 3rd ed., Vol. 19, p. 543; Wilde, *Hire-Purchase*, p. 100) and supported by the decision of McNair J. in *United Dominions Trust (Commercial), Ltd.* v. *Parkway Motors, Ltd.* [1955] 2 All E.R. 557 that the hirer has no assignable rights where the agreement prohibits assignment. This has been criticised (Bickford-Smith, 105 L.J. 499) on the ground that a chose in action is property and so, like a lease, assignable despite a prohibitory clause, although this may justify termination of the agreement against the assignee. But pure personalty has never enjoyed the advantages of the land law's doctrine of estates or its clear-cut distinctions between proprietary and contractual interests, as the bailee's ill-defined " special property " shows. Nor, with respect, does *Re Turcan* seem to establish any general principle of assignability in equity. There the question was whether a covenant to settle after-acquired property bound moneys payable under an insurance policy which provided that the insurance company should not be affected by notice of any trust, equitable charge or lien on the policy and that " this policy shall not be assignable in any case whatever." The Court of Appeal held that this clause merely prevented assignment at law under the Policies of Assurance Act, 1867, whilst leaving the policy assignable in equity. But did not the phrase concerning notice of trusts, equitable charges and liens imply that equitable assignments were contemplated? May not the more comprehensive clauses commonly used in hire-purchase agreements today prevent even equitable assignments?

Nevertheless *Spellman* v. *Spellman* illustrates one of the main causes of difficulty in hire-purchase law, namely the average hirer's firm but mistaken belief that the goods are his to be disposed of as he pleases by gift or sale. Clauses prohibiting assignment of the benefit of the agreement add to this difficulty and a statutory right to assign subject to suitable safeguards for the owner seems highly desirable.

J. W. A. Thornely.

INDEPENDENT CONTRACTOR—HAGUE RULES—CARRIER'S LIABILITY

FOLLOWING the decision of the Court of Appeal in *Riverstone Meat Co. Pty., Ltd.* v. *Lancashire Shipping Co., Ltd.* it was suggested that the case formed one of a trilogy of general importance in the law ([1960] C.L.J. 17). In view not simply of the House of Lords' reversal of the Court of Appeal's decision ([1961] 2 W.L.R. 269) but of the content of the speeches, that suggestion is now withdrawn. Though not expressly denied, the analogy previously accepted between the carrier's liability under the Hague Rules and the liability of a master to his servant was either ignored or dismissed as unreliable, and no attempt was made to relate the decision to the general principles of vicarious liability and liability for independent contractors. It is certainly to be hoped that no such statement as that of Lord Simonds, to the effect that the defendants were " vicariously liable for the negligence of a servant of an independent contractor " (at p. 283; *cf.* Lord Radcliffe at p. 300) will be allowed to escape from the confines of a specialised and technical branch of the law having a terminology of its own.

The case must be regarded, therefore, as turning purely upon the meaning to be attributed to the words " exercise due diligence to make the ship seaworthy," and it is not thought that their Lordships would have it otherwise. But as Lord Radcliffe observed, the natural meaning of those words does not accord well either with the meaning put upon them by the Court of Appeal or that contended for by the plaintiffs and accepted by the House of Lords. Though restricted to its context in the Hague Rules, the problem was still more than one of grammatical construction. The obligation put upon the carrier, as the instant decision clearly establishes, is considerably more severe than the obligation to take reasonable care, but it is nevertheless not so severe as a duty to provide, or see, that care is taken. None of their Lordships was disposed to cast doubt on the actual decision in *Angliss's* case and all accepted that the carrier is not liable for the negligence of the shipbuilder before the ship becomes the property of the carrier. The suggestion made on the strength of the Court of Appeal's decision, namely, that the intermediate duty called for by the need to reconcile *Wilson's* case with *Davie's* case may be a duty to provide non-negligent supervision, can no longer be sustained by the *Riverstone* case itself, but despite the fact that some of their Lordships refused to accept a distinction between one independent contractor and another, the distinction between a shipbuilder and a ship repairer was taken. It is submitted, therefore, that even though the *Riverstone* case now does little if anything to resolve the difficulty of reconciling *Wilson's* case with *Davie's* case, it is, at least, not inconsistent with all the

suggestions previously made. It remains true that there are duties —of which the duty to " exercise due diligence " is one—which fall between the duty personally to take care and the duty to provide, or see, that care is taken. But how those duties should be formulated is once more an open question.

J. A. Jolowicz.

NEGLIGENCE—CARELESS MISSTATEMENT—PHYSICAL DAMAGE

The decision of Salmon J. in *Clayton* v. *Woodman & Son (Builders) Ltd. and Others* [1961] 3 W.L.R. 987 is a noteworthy contribution to the development of the tort of negligence in that it deals with the question whether there is a duty not to inflict foreseeable *physical* damage by making a careless misstatement.

The plaintiff was a bricklayer employed by builders, the first defendants, who had contracted with a regional hospital board, the second defendants, to instal a lift in their hospital. The third defendants were a firm of architects employed by the hospital board to prepare plans for the construction of the lift. The building contract between the builders and the hospital board provided that the work was to be carried out in accordance with the architects' directions. One of the architects inspected the premises and gave instructions on the site direct to the plaintiff to cut a chase or groove in the side of a stone gable without shoring or strutting the gable. He knew that the plaintiff would carry out his instructions promptly on that day. Salmon J. had no doubt at all that an ordinary architect using reasonable care and skill would certainly have realised the extreme danger of cutting a chase without shoring or strutting the gable, and that knowledge of this danger was not to be expected of the plaintiff, a bricklayer. While the plaintiff was cutting out a small piece of stone, after the chase had been cut, the gable fell inwards injuring him. In an action for personal injuries by the plaintiff for negligence and breach of statutory duty against his employers, the builders, negligence against the firm of architects, and negligence and failure to comply with their duties under the Occupiers' Liability Act, 1957, against the hospital board, Salmon J. held

(1) The architects were liable to the plaintiff in negligence in accordance with the " neighbour " principle of *Donoghue* v. *Stevenson*. Having regard to the exceptionally close relationship between the architects and the bricklayer on the particular facts of the case in giving him instructions, they owed a duty to take reasonable care for his safety. The subject-matter, that is, cutting the chase, was one about which, as between the architects and the hospital board, the architects had a duty to decide. The architects

under their contract had the right to issue instructions to the builders, they knew that the instructions would be carried out promptly, they chose to give them directly to the bricklayer who, being a bricklayer and not a stone mason, would not have reason to suppose that danger would be involved in carrying them out. As the architects should certainly have realised that the carrying out of the instructions in the circumstances would probably lead to serious injury, they had failed to exercise reasonable care.

Relying on *Derry* v. *Peek* (1889) 14 App.Cas. 337, *Le Lievre* v. *Gould* [1893] 1 Q.B. 491 and *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164, counsel for the architects submitted that the instructions were no more than a statement, and that in law a careless as distinct from a fraudulent statement is not actionable in the absence of a contractual or fiduciary relationship between the parties, for in the absence of such a relationship there is no duty to take care, and in the absence of such a duty there can be no actionable negligence. Salmon J. took the view that to make a statement or representation believing that someone will probably act on it is not equivalent to issuing orders or instructions which one knows will certainly be obeyed. Even if that were not a valid distinction, the defendants were still under a duty to the plaintiff. *Donoghue* v. *Stevenson* has been frequently applied but only where the damage complained of was physical, *i.e.*, damage to person or property, whereas the damage in *Le Lievre* v. *Gould* (*supra*) and in *Candler* v. *Crane, Christmas & Co.* (*supra*) was not physical but financial. Despite the contrary view expressed by Asquith L.J. in the latter case at p. 190, Salmon J. did not consider that *Candler's* case excluded careless statements causing physical damage from the ambit of *Donoghue* v. *Stevenson*, but only those causing financial loss. *Candler's* case rests solely on the narrow ground that *Le Lievre* v. *Gould* was not overruled by *Donoghue* v. *Stevenson* and is still binding on the Court of Appeal. His Lordship admitted that his view added illogicality to illogicality but that seemed preferable to enlarging the class of those to whom a remedy is denied. Salmon J. (pp. 994–995) agreed substantially with the submission of counsel for the architects, that the law imposes no duty on the architect to advise builders or their servants, about their safety, and that he would be within his rights were he to stand by and without protest or warning watch the plaintiff doing something which he knew to be highly dangerous. Further, had the architects issued instructions direct to the builder, and as a result of their being obeyed, the plaintiff had been injured, the architects would not have been liable to him, because the builders would in such circumstances have been interposed between the instructions and the doing

of the work, and the proximity between the plaintiff and the architects would not have been sufficiently close to impose any duty of care on them.

(2) The builders were liable to the plaintiff, their employee, in negligence and also for breach of statutory duty under regulation 94 (2) of the Building (Safety, Health and Welfare) Regulations, 1948.

(3) The plaintiff's claim against the hospital board for alleged breach of their duty as occupiers to take reasonable care for his safety as an invitee failed. The hospital board were not " vicariously " liable for any negligence on the part of their architects who were clearly independent contractors whom the hospital board reasonably believed to be competent. The premises were perfectly safe when the architects and builders were called in; the work of construction was essentially a technical matter for them to decide, and the hospital board had acted reasonably in the circumstances.

T. Ellis Lewis.

NUISANCE—RYLANDS V. FLETCHER—SMUTS, SMELLS AND NOISE

Halsey v. *Esso Petroleum Co., Ltd.* [1961] 1 W.L.R. 683 illustrates the interrelation and the overlapping of liability in public and private nuisance and liability under the rule in *Rylands* v. *Fletcher*. The plaintiff was the owner and occupier of a house in a residential area. The defendants owned and operated an oil storage and issuing depôt in an adjoining industrial area where there were other premises dealing with oil. In the depôt opposite the plaintiff's house there was a boiler house used in connection with the heating of fuel oil. The boilers were heated by burning oil and from the chimneys acid smuts were emitted which damaged the plaintiff's washing hung out to dry in his garden, and damaged the paintwork of his car standing in the street outside his house. The depôt emitted pungent and nauseating oily smells which in recent years had been growing in intensity and frequency. Since 1956 the defendants introduced a night shift from 10 p.m. to 6 a.m. and thereafter the noise from the boilers at their peak periods reached an intensity of 68 decibels, despite every effort by the defendants to minimise it. The noise caused the plaintiff's windows and doors to vibrate and prevented him from sleeping. Further, at intervals throughout the night, there was a very loud noise from heavy oil tankers which arrived at and left the depôt at points near to and opposite the plaintiff's house. Sometimes when they passed in convoy the noise was 83 decibels. The noise from the tankers was made partly in the public highway and partly in the depôt. Veale J. held the defendants

liable in an action by the plaintiff for nuisance by smuts, smell and noise.

(a) For the emission of acid smuts which caused damage to the plaintiff's washing hanging on his land and to his car standing in the street, they were liable

(i) under the rule in *Rylands* v. *Fletcher* since the damage was caused by the escape of a harmful substance from the defendants' land. This seems to be the first decision that damage caused to a motor car on the highway is recoverable under the above rule. Had the plaintiff suffered personal injury from the acid smuts whilst walking on the highway, it is not so certain that he could recover under this rule. *Miles* v. *Forest Rock Granite Co.* (1918) 34 T.L.R. 500 is authority for the plaintiff, but there are dicta in *Read* v. *Lyons* [1947] A.C. 156, 168–169, 172–173, 178 suggesting that the rule has no application at all to personal injuries, though these have been disregarded in *Aldridge* v. *Van Patter* [1952] 4 D.L.R. 93 and by Parker L.J. in *Perry* v. *Kendricks Transport Ltd.* [1956] 1 W.L.R. 85, 92 (C.A.).

(ii) For damage to the washing there was liability in private nuisance. There were other oil depôts in the district, but where material damage is caused to property the character of the neighbourhood is not to be taken into consideration, and negligence is not an ingredient in the cause of action. The character of the neighbourhood is only of importance in the consideration of liability for nuisance by noise and smell.

(iii) They were also liable for damage to his motor car as for a public nuisance in respect of which the plaintiff had suffered special damage. Even if the plaintiff was not entitled to leave his car in the street, this did not disentitle him to recover. As the motor car was not on the plaintiff's land, he could not have recovered in private nuisance, for " He alone has a lawful claim who has suffered an invasion of some proprietary or other interest in land "—*Read* v. *Lyons* [1947] A.C. at p. 183, *per* Lord Simonds. Veale J. made no finding on this point (p. 692).

(b) For the smell there was liability in private nuisance. It was more than a general background of oily smells, it went far beyond a triviality and in view of its frequency and intensity it was more than would affect a sensitive person; it was " horrible," " stinking," " pungent " and " nauseating." Injury to health was not a necessary ingredient in an action for nuisance by smell.

(c) The noise from the boilers and the tankers while in the depôt at night was actionable as a private nuisance, since it was an inconvenience materially interfering with the ordinary comfort physically of human existence according to the plain sober and

simple standards among ordinary people living in this part of Fulham, for the ordinary man takes his rest at night. It was no answer to say that the best known means had been taken to reduce or prevent the noise and smell, or that the cause of nuisance was the exercise of a trade or business in a reasonable manner. No question arose of the noise or smell diminishing the market value of the plaintiff's property. The defence of prescription failed for there had been persistent complaints and it had not continued for anything like twenty years.

(d) The noise from the tankers at night on the highway was a public nuisance, for the concentration of particularly noisy vehicles outside the plaintiff's house was an unreasonable user of the highway, in just the same way as parking a number of unlit vehicles on the road, and the plaintiff had suffered special damage by it. Further, it was a private nuisance, as it constituted an interference with the plaintiff's enjoyment of his house. Veale J. applied the dicta of Devlin J. in *Southport Corporation* v. *Esso Petroleum Co.* [1956] A.C. 218 at pp. 221, 224 that it was not a prerequisite of private nuisance that the matter complained of must emanate from the defendant's land, in preference to the contrary views of Denning L.J. and Lord Radcliffe (*ibid.* at p. 242). Veale J. did not regard motor vehicles, even the defendants' tankers, as dangerous within *Rylands* v. *Fletcher* (p. 701). The relevancy of this view is not clear, for there is no case of liability incurred under the rule for interference caused by noise or smell and he held the defendants liable in nuisance under these heads. True, that in *Hoare* v. *McAlpine* [1923] 1 Ch. 167 there was liability under the rule for vibrations causing structural damage, but this case has been severely criticised, and nuisance has been suggested as a better ground of liability (see Winfield, *Tort*, 6th ed., p. 606 n. (a); Street, *Tort*, 2nd ed., p. 246 n. (1)). A motor car with petrol in its tank (*Musgrove* v. *Pandelis* [1919] 2 K.B. 43 (C.A.)) and a motor coach with only petrol fumes in its tank (*Perry* v. *Kendricks Transport Ltd.* [1956] 1 W.L.R. 85 (C.A.)) have been held to be dangerous within *Rylands* v. *Fletcher*, but the damage in those cases was caused by fire and not by noise or smell. Even those cases may require reconsideration in view of dicta in *Read* v. *Lyons* [1947] A.C. 156 at p. 176; and see 72 L.Q.R. (1956) 184–186.

The damages awarded were £200 in respect of discomfort from noise and smell, £30 for the motor car and £5 for the damaged clothes. Two injunctions were granted: one restraining the defendants from so operating their depôt or driving their tankers as, by reason of noise, to cause a nuisance to the plaintiff between the hours of 10 p.m. and 6 a.m.; the other restraining them from so

conducting operations at the depôt as, by reason of smell, to cause a nuisance to the plaintiff with no limitation as to the time of day. No injunction was granted to deal with the smuts, because the defendants undertook not to operate the boiler house with the offending chimneys three months after the entry of judgment.

T. Ellis Lewis.

MALICIOUS PROSECUTION—FAIR FAME—COSTS AS DAMAGE

In *Berry* v. *British Transport Commission* [1961] 3 W.L.R. 450 the plaintiff had been charged upon the complaint of the Commission with having pulled the communication cord in a train without reasonable and sufficient cause contrary to the Regulation of Railways Act, 1868. Having been convicted before the justices, she appealed to quarter sessions, where the appeal was allowed and " the prosecution determined wholly in her favour," the recorder awarding her fifteen guineas costs. She then sued the Commission for malicious prosecution, pleading as damage both injury to reputation and the expense of defending herself. The defendants contended, *inter alia*, that the statement of claim disclosed no damage in law and consequently no cause of action and this point of law was heard as a preliminary issue. Diplock J. upheld the contention and gave judgment for the defendants ([1961] 1 Q.B. 149). This decision was reversed by the Court of Appeal.

The starting point both for Diplock J. and for the Court of Appeal was naturally the celebrated judgment of Holt C.J. in *Savile* v. *Roberts* (1698) 1 Ld.Raym. 374, in which he formulated three heads of damage, any one of which would support the action for malicious prosecution: damage to fame, " as if the matter whereof he is accused be scandalous," damage to person, " as where a man is put in danger to lose his life, or limb, or liberty," and damage to property, " as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused " (*ibid.* p. 378). This settled the then vexed question whether the purely pecuniary loss sustained in legal expenses was sufficient to support the action.

The offence with which the plaintiff in the present case had been charged was punishable by a monetary penalty only and Holt C.J.'s second head of damage was therefore not relevant, since the possibility of eventual imprisonment on non-payment of a penalty does not satisfy the requirement: *Wiffen* v. *Bailey and Romford U.D.C.* [1915] 1 K.B. 600. Diplock J. held that under neither of the other two heads was damage present; there was no damage to fame because the charge was not *necessarily and naturally* defamatory

and there was no damage to property because the plaintiff's additional legal expenses over and above the fifteen guineas awarded to her by the recorder did not constitute sufficient special damage to found the action.

The greater part of his judgment was devoted to the first of these two points and contains a careful consideration of its development since Holt's day. The learned judge clearly regretted that it was no longer possible to apply the analogy of slander and restrict damage to fame to those charges which in slander would be actionable *per se*. This analogy is suggested by Holt C.J.'s use of the word " scandalous " which the judge was probably right to treat as synonymous with " slanderous " (*cf.* the old form " sclander "), but it has hardly been supportable since *Rayson* v. *South London Tramways Co.* [1893] 2 Q.B. 304, where the Court of Appeal held that an action for malicious prosecution lay even though the offence charged was punishable only by a monetary penalty and not by imprisonment. One may or may not share Diplock J.'s regret at the extension which the first head of damage has undergone, but it is difficult *not* to regret the excessive subtlety of the test which has apparently replaced the old analogy as a result of *Wiffen* v. *Bailey and Romford U.D.C.* It is most neatly formulated by Diplock J.: " Was the charge one which necessarily and naturally is defamatory of the plaintiff? . . . Is the statement that the plaintiff was charged with the offence capable of a *non*-defamatory meaning? And to obtain the answer to that question I have to postulate all possible circumstances in which a person might be successfully prosecuted for the offence of which the plaintiff was charged, and ask myself if I can conceive of facts which, if stated of the plaintiff, would not be defamatory of her . . . although they would support a conviction for that offence " ([1961] 1 Q.B. at p. 166). Such a test is reminiscent of the methods used in the seventeenth century to discourage the action of defamation itself, of which *Holt* v. *Astgrigg* (1607) Cro.Jac. 184 is a notorious example. This is surely a sufficient condemnation in itself.

It may be that Diplock J. had no option but to apply this test, but it is respectfully submitted that there was sufficient inconsistency in its previous decisions (*Rayson's* case and *Wiffen's* case, *supra*) to enable the Court of Appeal to reconsider the test. Its decision on the question of legal expenses, however, made it unnecessary for that court to consider the point and it declined to do so, but unfortunately in language which tended to give some countenance to the test. (It is important to note in this connection that the headnote is inaccurate in stating that Diplock J.'s decision was reversed only in part.) Ormerod L.J. was " inclined to uphold

the view expressed by the judge " and Devlin L.J. accepted that the test, though " not a very satisfactory one," was " clearly laid down " as the correct one by the Court of Appeal in *Wiffen's* case, " an authority by which we are bound." One may suspect that the test was developed as a check upon over-sympathetic juries—this was certainly so in *Wiffen's* case itself—and section 6 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, may perhaps be held to justify its continued existence; nevertheless it is respectfully submitted that Danckwerts L.J.'s condemnation of the test as " unreasonably exacting " is fully justified and that the standard should be " whether a reasonable man, hearing of the proceedings brought against the plaintiff, would form the view that they were a damaging reflection on the ' fair fame ' of the plaintiff." This would still leave open, of course, the question whether the particular offence of pulling the communication cord entails the necessary damage to fame, although it would appear to do so.

The matter has, however, probably been rendered academic in most cases by the Court of Appeal's reversal of Diplock J. on the other point, namely, legal expenses. All three judges were unanimous in refusing to extend to criminal cases the rule that costs incurred in excess of the sum allowed on taxation are not recoverable as damage, so that the difference between the solicitor and client costs which the plaintiff had in fact paid and the fifteen guineas awarded to her by the recorder was therefore sufficient to support her action. Although the relevant statutes conferring power to award costs in criminal cases are not uniform in their wording and differ materially from the provisions governing costs in civil cases, it seems unnecessary to examine them here as they were carefully considered in the judgments, particularly those of Devlin and Danckwerts L.JJ. As both judges pointed out, more important is the difference in the practice of awarding costs in criminal cases; and this difference justified a refusal to extend a rule which Danckwerts L.J. roundly condemned and all three Lords Justices considered unrealistic. The unreality derives, of course, from the present stringency in taxation of costs, in which, however, Devlin L.J. was ready to see some benefit as helping to keep down extravangance in litigation.

The decision of the Court of Appeal does not necessarily apply where the costs in a criminal case are " taxed," as it were, to give an indemnity and not merely a contribution (see pp. 464, 467, *per* Devlin L.J.); but such an award is the exception rather than the rule and so long as it remains so their decision is very welcome. After all, a plaintiff still has to prove both malice and the absence of reasonable and probable cause.

M. J. Prichard.

DAMAGES—LOSS OF PROSPECTIVE EARNINGS—SHORTENED EXPECTATION OF LIFE

In *Oliver* v. *Ashman* [1961] 3 W.L.R. 669, there was raised once again a problem which has been before the courts on several occasions in recent years, namely, the correct method of calculating damages for loss of prospective earnings where the plaintiff's expectation of life has been reduced. Should the period—which Pearson L.J. conveniently calls the " lost period "—between the end of the plaintiff's expected life as shortened by the accident and the end of his expected working life as it would have been if the accident had not occurred be taken into account. In *Pope* v. *Murphy* (noted in [1960] C.L.J. 160) Streatfeild J. had held that it should, and in the present case Lord Parker C.J. at first instance ([1961] 1 Q.B. 337) had expressly stated that he chose to follow Streatfeild J.'s decision on the point.

This was, in a way, surprising, for the case was not one in which loss of prospective earnings would seem to have been an important item of the plaintiff's damage. The plaintiff was aged but twenty months at the date of the accident. What is, perhaps, rather more surprising is that the Court of Appeal, while leaving Lord Parker C.J.'s award of damages undisturbed, went out of their way, in elaborate judgments, to hold that on this point he had been wrong. Evidently the point was considered to be of no small importance.

Some of the considerations on the point have already been discussed ([1960] C.L.J. 160) and it is sufficient, therefore, to say that the Court of Appeal felt unable to accept a distinction between a claim brought by a living plaintiff and one brought on behalf of a deceased person's estate by his personal representatives, though Pearce L.J., at least, thought that the result was, perhaps, unfortunate. The conclusion that no damages could be awarded for loss of earnings which would have accrued during the lost period was thus pretty well inevitable. It would be intolerable, in a case in which the victim is already dead, to award damages in respect of the lost period to his estate under the Law Reform Act of 1934 and also to award damages to his dependants under the Fatal Accidents Acts. It is a little strange, however, to find that the decision is said to follow necessarily from *Benham* v. *Gambling* [1941] A.C. 157. That case was concerned with the problem of fixing " a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness " (*per* Viscount Simon L.C. at p. 166) and it is for this reason, surely, that Viscount Simon said, " of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived " (at p. 167). With great

respect, this does not mean that no regard must ever be had to financial losses or gains in any case in which the victim's expectation of life has been reduced. Too much attention must not be paid to the precise way in which a claim is formulated, but *Benham* v. *Gambling* was not concerned with loss of earnings at all. If, as may well be the case, some reform of the law is here required, it should not be thought that a fundamental principle laid down by the House of Lords would have to be overturned.

J. A. Jolowicz.

EASEMENT IN FUTURO—RULE AGAINST PERPETUITIES

Dunn v. *Blackdown Properties Ltd.* [1961] Ch. 433 raises questions that have not seriously troubled conveyancers previously but which have caused textbook writers some concern.

In the years 1926 and 1938 a vendor sold land, apparently for building purposes, retaining adjoining land upon which a road was already built. The intention was that if and when the vendor or his successors in title constructed sewers on his own land the purchasers and their successors in title should have the right to connect up their drainage with the vendor's sewers and discharge their sewage through them.

A suitable precedent has appeared in the books for some time [*cf.* Key and Elphinstone, *Precedents in Conveyancing*, 15th ed. Vol. 1, p. 795, footnote (*d*)]. It provided for the incorporation in the conveyance of a provision granting to the purchaser a right of way over the roads then formed on the vendor's land and over such roads as should be formed made or opened for use, together with free use of the drains and sewers then passing or thereafter to pass under the said roads. A similar provision was incorporated in the conveyances.

Several years later sewers having been constructed on the vendor's land the successors in title to the purchasers claimed to exercise the right to connect sewers to the vendor's sewers. The vendor's successors in title resisted the claim on the ground that the right infringed the Rule against Perpetuities. Cross J. in *Dunn's* case has upheld this view.

There is no doubt that the Rule against Perpetuities does apply to easements. The difficulty arises in distinguishing between an easement which is immediately vested and an easement *in futuro*. A vested easement meets the Rule automatically: an easement *in futuro* is subject to the Rule. It has been suggested by the learned editor of *Gale on Easements* that as far as easements *in futuro* are concerned the question is whether the site of the easement will be

necessarily ascertained and whether the right granted will be necessarily exercised in due time.

Two cases exist which cast some light on the subject. In *South Eastern Railway Company* v. *Associated Portland Cement Manufacturers (1900) Limited* [1910] 1 Ch. 12 a landowner in 1847 reserved, in a conveyance of property to a railway company, a right to construct a tunnel under a proposed railway where it passed or was intended to pass through or over the land conveyed. Swinfen-Eady J. held that the right was an immediate easement and not an easement *in futuro*. In *Sharpe* v. *Durrant* (1911) 55 S.J. 423, a vendor reserved the right to cross a tramway, the land for which he had sold to a purchaser, at two points to be selected by him. In an action by the vendor against the purchaser's assigns, Warrington J. held that the reservation was void under the Rule against Perpetuities on the ground that until selection was made there was no easement.

The *South Eastern Railway* case is doubly difficult. In the first place it was an action against the original contracting party by an assignee of the benefit of it, a case which has been held to be unaffected by the Rule. Secondly, on the construction of the document, there was an immediate right to dig a tunnel across the land, whether a railway was ever built there or not. This construction clearly could not be applied in the present case. Since there were no sewers existing at the time of the grant the plaintiffs could only rely upon the grant of the right to connect up with the sewers which *thereafter* were to pass under the roads. On such a construction Cross J. felt compelled to hold that the right granted was a right *in futuro*. As such it was void under the Rule since it would only become an immediate right when the sewers were built, which might occur outside the period laid down by the Rule.

Presumably in such a case a draftsman could insert a proviso that the grant should only be effective if the sewers were built within the lifetime of specific lives in being or within twenty-one years of the death of the last survivor of them. If that were done it would seem that Cross J. would hold that it was a valid right to connect up with the main sewer and to discharge into it such a quantity of sewage which it could reasonably bear, having regard to the main sewer's existing commitments. Perhaps the conveyancer in drafting such a document ought to consider the situation which would arise if the owner of the servient tenement built a main sewer just large enough to take his own sewage. In such a case the dominant owner's rights would appear to be illusory.

There was, however, another important point, arising out of the Law of Property Act, 1925, s. 162 (1). Subsection (1) reads:

> " For removing doubts, it is hereby declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied . . ."

and continues in subsection (*d*) (iv):

> " constructing, laying down, altering, repairing, renewing, cleansing, and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works."

This statement would seem to meet the case. Cross J. however, pointed out that the rest of the subsubsections were concerned with cases of people who owned vested rights, together with ancillary rights which were needed for the enjoyment of the vested rights and were designed to prevent those ancillary rights being defeated by the Rule. He was not prepared to construe the subsection with which he was dealing in a different sense. The purchaser's successors in title could only succeed on this argument if they could show that they had a vested right of drainage to which the right to connect with the vendor's main sewer was ancillary. They could not do this and therefore their claim failed.

Even if the grant had not met with disaster under the Rule, the grant, it would seem, might fail in any event. Would not a grant attached to an unidentified, non-existent building of a right to discharge an undefined quantity of sewage on a line not yet fixed, to a sewer not yet built, of a capacity nowhere agreed, fail on the ground that it was too uncertain?

KENNETH SCOTT.

SETTLEMENT—RULE IN ANDREWS *v.* PARTINGTON—DISTRIBUTION OF TRUST FUNDS

THE so-called class closing rules have of recent years attracted the attention of judge and text writer (see Dr. J. H. C. Morris in (1954) 70 L.Q.R. 61 and Professor S. J. Bailey in [1958] C.L.J. 39). In *Re Bleckly* [1951] Ch. 740, 751, Jenkins L.J. described them as a " somewhat battered veteran," adding however, that this particular veteran still remained " on its feet after upwards of 200 years." *Re Wernher's Settlement Trusts, Lloyds Bank Ltd.* v. *Mountbatten* [1961] 1 W.L.R. 136; [1961] 1 All E.R. 184 is yet another example of their resilience and potency.

Sir Harold Wernher had, by a settlement dated March 20, 1931, directed trustees to hold trust funds in trust for " all such children of the settlor (whether now living or hereafter to be born) as being male attain the age of twenty-one years or being female attain that age or marry and in such proportions that each son shall receive twice as large a share as each daughter." When he executed the

settlement Sir Harold was thirty-eight years of age and his three children, a son and two daughters, were all under twenty-one and unmarried. At the date of the originating summons in 1960, the son had reached twenty-one and had died and both daughters were over twenty-one and had married; no further children had been born, but Sir Harold was still alive. The question which Buckley J. was asked to decide was whether the trustees could distribute the settled funds among these children immediately (one-half to the son's estate and the remainder equally between the two daughters), or whether the trust funds were to be held for *all* Sir Harold's children, living and future, who could not of course, be ascertained until Sir Harold's death. The answer to this question depended on the application of the rule in *Andrews* v. *Partington* (1791) 3 Bro.C.C. 401, which provides that where there is a bequest of a global sum to members of a class, the class closes when the first child is entitled to call for his share. All potential members coming into existence after that date are excluded.

Buckley J. accepted that the rule was a rule of construction and held that there was no contrary intention in the Wernher settlement to exclude it. To reach this conclusion he had to surmount three persuasive arguments. First, the trust fund was settled by deed and not by will, and this fact was sufficient, argued counsel for the trustees, to exclude *Andrews* v. *Partington* and to admit the after-born children. For " in the case of a settlement a settlor knows the circumstances as they exist at the time when he declares the trusts of the settlement, whereas a testator cannot foresee precisely what the circumstances will be when he comes to die." And since Sir Harold was only thirty-eight at the date of the settlement, it would be surprising if he did not intend to include all his children, born and to be born. Here in fact in the form of the instrument constituting the trusts was a sufficient contrary intention to exclude the rule. The argument was ingenious but not novel and North J. in *Re Knapp's Settlement* [1895] 1 Ch. 91, 98–99 had rejected in a peremptory passage what must have been a similar submission. Buckley J. was content to follow the authority of that case. In our view Buckley J. was right to do so; to have accepted the argument of counsel would have introduced an unreal distinction into an already highly refined branch of the law. The evidence required to exclude *Andrews* v. *Partington* must be, so it has been repeatedly, if unfortunately, held, clear, emphatic and unequivocal, and mere difference in form between a will and a deed is not enough; see also the uncited cases of *Re Paul* [1920] 1 Ch. 99 and *Exham* v. *Beamish* [1939] I.R. 336.

Counsel's second argument was this. He said that even if the

rule did apply to settlements, the words of this particular settlement—" whether now living or hereafter to be born "—indicated that *all* Sir Harold's children were to take and that the class closing rules were therefore excluded. Buckley J. rejected this argument. He quoted Lord Evershed's observation in *Re Bleckly* (at pp. 750–751) that a testator, and now a settlor, must be presumed to have the rule in mind when he executed the trust instrument. Evidence is necessary to show not only that all children are to take, but that all children are to take " whenever born, notwithstanding the rule." On the facts of *Re Wernher*, an intelligible meaning could be given to the settlor's words by relating them to the period between the date of the deed and the date of distribution when the first child attained a vested interest. The facts were therefore distinguishable from *Scott* v. *Lord Scarborough* (1838) 1 Beav. 154, where the particular words clearly suggested that all children should take even those born after the first child had obtained a vested interest.

Finally, his Lordship applied the decision in *Re Chartres* [1927] 1 Ch. 466 and held that no contrary intention could be gleaned from the fact that the settlement did not specifically direct the trustees to pay out each child's share on attaining a vested interest: *cf.* S. J. Bailey, *op. cit.*, p. 44.

In the result, therefore, *Re Wernher* is a rather unremarkable decision, although it does confirm that settlements as well as wills are within *Andrews* v. *Partington*. On the particular facts of the case, the result reached by the learned judge was highly satisfactory, for both Sir Harold and his daughters were anxious for an immediate distribution. Yet, the consequences of the application of *Andrews* v. *Partington* on other facts may not be so pleasant. Astbury J.'s dark words of premonition in *Re Chartres* at p. 471 are perhaps worth recalling: " the rule is, of course," he said, " obviously convenient to those who take under it . . . but the irony of the rule is no doubt more apparent to those who are by its application excluded from taking what the testator intended them to take."

GARETH H. JONES.

BAILMENT—POSSESSION—FALSE TRADE DESCRIPTION—MERCHANDISE MARKS ACT, 1887

WHEN a bailment is revocable at will it is well known that, not only the bailee, but the bailor also is regarded as having possession of the object bailed. This is because, to quote Viscount Jowitt, " the person having the right to immediate possession is . . . frequently referred to in English law as being the ' possessor ' " (*U.S.A.* v. *Dollfus Mieg et Cie.*, [1952] A.C. at p. 605). English lawyers have

known this for a long time (*e.g.*, Y.B. 2 Edw. IV, 25, Laicon *arg.*; *Lotan* v. *Cross* (1810) 2 Camp. at p. 465; *Ancona* v. *Rogers* (1876) 1 Ex. Div. at p. 292); the Roman lawyers took the same view (*e.g.*, Dig. 41.2.17 *pr.*). The recent decision in *Towers & Co., Ltd.* v. *Gray* [1961] 2 W.L.R. 553, therefore, adds nothing new. In this case the Lord Chief Justice, with whom Winn and Widgery JJ. concurred, said, " ' possession ' has been given a broad interpretation covering something more than actual physical possession, covering cases where, at any rate, a man has the right on demand to recover goods from a bailee " (p. 560; see also p. 561 for a similar statement).

The case is nevertheless of some interest because of the frank avowal in no less than three places that the meaning of possession depends, not upon any physical and mental elements (*corpus* and *animus*), but on the context in which the word is used (pp. 558. 561. It might be useful to refer also to the words of Lord Guest in *Wuta-Ofei* v. *Danquah* [1961] 1 W.L.R. at p. 1243). It may be superfluous to point out that *corpus* and *animus* are only conditions that sometimes have to be present before a person is said to have possession and that, even so, they are more in evidence when the question concerns the commencement of possession as distinct from its continuation, which is the case with the continuing possession by a bailor at will. The *corpus* and *animus* theory addicts might derive more comfort from another recent utterance, also of the Lord Chief Justice, than from the present case: (*R.* v. *Cavendish* [1961] 1 W.L.R. at p. 1085, where, incidentally, the question concerned the commencement of possession). It is a notorious fact that the term possession has no fixed meaning, that it varies from branch to branch of the law or, as the Lord Chief Justice put it, with the context. In most contexts considerations of justice or policy are easily discernible behind the variations. In the present case the need to conform to the settled rule about the bailor at will rather than justice appears to have been the governing factor. This, it may be observed, is one of the very rare rules of any generality in the realm of possession. The context was as follows. The appellant company stored frozen chickens, which they received from a farmer, with the X Company on terms that the goods were returnable on demand. Each chicken was enclosed in a cellophane bag on which the farmer had marked its weight. The appellants later became aware that the marked weights were incorrect since the farmer's scales were faulty. They then instructed their manager to check the weights in bulk before the chickens were dispatched to customers. Before this could be done an inspector of weights and measures carried out a check as

the result of which the appellants were charged before the magistrates and convicted under section 2 (2) of the Merchandise Marks Act, 1887 (as amended), which makes it an offence for any person to have " in his possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied," unless he can prove " that otherwise he had acted innocently." The simple point was whether the appellants were in possession within the meaning of this section. It was held that they were and their appeal against conviction by way of case stated was dismissed. Justice could not have been the ground on which possession was " laid " in them, for although the defence that they had acted innocently was rejected, the Lord Chief Justice indicated that they were morally guiltless nonetheless (p. 562). How such a thing could be is explicable presumably on the ground that for the statutory defence to apply the accused must not even have become aware of any misdescription during the time that the goods are in his possession. (*Slatcher* v. *George Mence Smith, Ltd.* [1951] 2 K.B. 631, which was cited in this connection does not appear to be directly in point.) The effect of the case, at its narrowest, is that the term possession is applicable to facts such as these for the purpose of this particular provision; at its broadest, it is simply an illustration of the long-established rule that generally in civil and criminal law a bailor at will remains in possession of the thing bailed.

One minor point may be mentioned. The Divisional Court refused leave to appeal to the House of Lords but certified nevertheless that a point of law of general public importance was involved. This enables the House of Lords to grant leave to appeal if they think fit (*Gelberg* v. *Miller* [1961] 1 W.L.R. 459). Whether anything further will occur or not remains to be seen.

R. W. M. Dias.

JUDICIAL PRECEDENT—COURT OF APPEAL—RULE IN YOUNG V. BRISTOL AEROPLANE CO.

In *Cane* v. *Royal College of Music* [1961] 2 Q.B. 89, the Court of Appeal adhered faithfully both to the rule in *Young* v. *Bristol Aeroplane Co.* [1944] K.B. 718 that the court is bound by its previous decisions, and to the rule laid down by the House of Lords in *Jacobs* v. *L.C.C.* [1950] A.C. 368 that where a case is decided on alternate grounds both are *ratio decidendi*. The point for determination was whether the College was exempt from rates as a society instituted for purposes of science, literature or the fine arts exclusively, and supported in part by annual voluntary contributions. One question

was whether annual government grants could be said to be voluntary contributions. The court indicated that they would have so held, had the matter been *res integra*, but they considered themselves bound to decide the contrary, because of two previous decisions of the Court of Appeal in *Metropolitan Borough of Battersea* v. *British Iron & Steel Research Association* [1949] 1 K.B. 434, and *British Launderers' Research Association* v. *Borough of Hendon*, *ibid.* at p. 462. In the 1949 cases the court had held that the Research Associations were not instituted for purposes of science exclusively, nor supported by annual voluntary contributions merely because in receipt of an annual government grant, and therefore on either ground ineligible for rating exemption.

The object of the rule in *Young* v. *Bristol Aeroplane Co.* is of course to achieve certainty, and pronouncements like that in *Cane* are directed to the same end, but sometimes the Court of Appeal adopts an attitude inconsistent with the principle behind *Young's* case. The last occasion on which this court had to consider the combined effect of that case and *Jacobs* v. *L.C.C.* was in *Fisher* v. *Taylors Furnishing Stores* [1956] 2 Q.B. 78. The landlord of shop premises, who had bought them within five years, and was therefore unable to resist the grant of a new tenancy under section 30 (1) (*g*), Landlord and Tenant Act, 1954, on the ground that he intended to occupy the premises himself, opposed the tenant's application under section 30 (1) (*f*), alleging that he intended to reconstruct a substantial part of the premises. After the alterations, he intended to occupy the premises himself. A year before in *Atkinson* v. *Bettison* [1955] 3 All E.R. 340, the Court of Appeal including two of the judges, Denning and Morris L.JJ., who sat in the 1956 case, had held that a landlord unable to rely on clause (*g*), who based his claim on clause (*f*), could do so only if his primary purpose was to reconstruct, and his intent to occupy personally but secondary. The 1955 court granted a new tenancy on two grounds, first that the landlord's primary purpose was to use the premises for his own business, and secondly that the proposed reconstruction was not of a substantial part of the premises. In the *Fisher* case, Denning L.J. was not slow to perceive the paramount importance of *Jacobs* v. *L.C.C.* He reminded counsel for the landlord that if the first ground of decision was also a binding ground of decision then it could not be altered by the Court of Appeal (82). In his judgment he explained *Atkinson* as deciding not that a secondary as distinct from a primary purpose did not suffice, but that a spurious, specious or colourable purpose as distinct from a genuine one was unavailing, thus contriving to distinguish restrictively his own previous judgment, and Morris L.J.

performed a similar *volte-face*. Soon afterwards the House of Lords overruled the first ground of *Atkinson*, and Lord Denning remarked that the Court of Appeal had already virtually overruled it in the *Fisher* case: *Betty's Cafés* v. *Phillips Furnishing* [1959] A.C. 20, 53. The effect of *Fisher* had already been seen in *Craddock* v. *Hampshire C.C.* [1958] 1 All E.R. 449, 453, in which the Court of Appeal held that *Atkinson* must be regarded as deciding what the court in *Fisher* said it decided and no more. By their change of front in the *Fisher* case, the Court of Appeal were able to outflank *Jacobs* v. *L.C.C.*, and also to create a situation in which there were two conflicting decisions of the Court of Appeal, enabling that court in the subsequent case of *Craddock* to choose between them under the first exception to the rule in *Young* v. *Bristol Aeroplane Co.* The court in *Craddock* said that it had to follow *Fisher*, but it could have revived *Atkinson*, just as in *Fisher* v. *Ruislip-Northwood U.D.C.* [1945] K.B. 584, the Court of Appeal resuscitated a previous decision of the court in *Morrison* v. *Sheffield Corporation* [1917] 2 K.B. 866 after it had been distinguished almost out of existence and not applied in *Lyus* v. *Stepney Borough Council* [1941] 1 K.B. 134.

Although the 1961 reports have yielded one decision (or rather a dictum as the college was held exempt from rates on other grounds) conforming to the rules governing precedent in the Court of Appeal, another is as productive of anarchy as the *Fisher* case in 1956, and with no compensating advantage in working an improvement in the law thereby. In *Ross-Smith* v. *R.-S.* [1961] P. 39, the Court of Appeal treated two previous decisions as in conflict, and overruled the earlier one, whereas in fact there was no conflict, indeed the first decision had been expressly accepted in the second, and studiously distinguished. The matter at issue was the jurisdiction of the court to hear nullity petitions on the ground of non-consummation of the marriage, where although the parties were domiciled outside England, the marriage had taken place in England, or at the time of the petition both parties were resident here. Until 1949 the direct authority had come from puisne judges and was in conflict. In *Inverclyde* v. *I.* [1930] P. 20, Bateson J. held there was no jurisdiction even where the marriage had been celebrated in England and both parties were resident here. However in *Easterbrook* v. *E.* (1944) 113 L.J.P. 17 and *Hutter* v. *H.* [1944] P. 95, puisne judges had held there was jurisdiction where the marriage had been celebrated in England, and the parties were resident here. In *Casey* v. *C.* [1949] P. 420, the Court of Appeal held there was no jurisdiction where the marriage had been celebrated in England, and the respondent was not resident here. In *Ramsay-Fairfax* v. *R.-F.* [1956]

P. 115, the court held there was jurisdiction where the parties were both resident in England at the time of the petition. In *Ross-Smith* v. *R.-S.* where as in *Casey* the marriage was in England but the respondent resided elsewhere, the court held that there was a conflict between *Casey* and *Ramsay-Fairfax*, and overruling *Casey* held there was jurisdiction. On an objective assessment, there was no conflict: *Casey* dealt with an allegation of jurisdiction based on the celebration of the marriage in England, *Ramsay-Fairfax* with jurisdiction conferred by common English residence. This is a distinction recognised as valid by Cheshire, who while approving *Ramsay-Fairfax*, at least on the score of convenience, is critical of *Ross-Smith*, and says that both in principle and on the balance of hardship the English place of ceremony is insufficient to ground jurisdiction: *Private International Law*, 6th ed., 360–366. Thus justice did not require the court to find a conflict where there was none. In *Ramsay-Fairfax* the court moreover had no intention of questioning the authority of *Casey*. Two of the judges, Morris and Hodson L.JJ. agreed with the judgment in the lower court of Willmer J. (134, 135), who was of course bound by *Casey*, but he said with perfect accuracy that the question now at issue had been expressly left open in *Casey* (122), and in fact used *Casey* to support the view he was taking (125). In short the court in *Ross-Smith* used the first exception to *Young* for a purpose for which it was never intended, as a cloak for expressing a different opinion, the very thing the rule in *Young* was designed to preclude, and moreover an opinion which is regarded by high academic authority as unjustifiable in principle. It is most regrettable to apply an exception to *Young* without producing a result demonstrably more just.

The attempt in *Young* v. *Bristol Aeroplane Co.* to produce a uniform jurisprudence in the Court of Appeal, though fostered by the self-denial and self-restraint shown by the court in *Cane* v. *Royal College of Music*, is doomed to failure as long as members of the court feel themselves at liberty to retract their very own recently uttered words as in *Fisher* v. *Taylors Furnishing*, or to spell out a conflict between case A and case B in order to reject case A, when all that case B purports to do is to settle a matter expressly left open in case A.

R. N. Gooderson.

FOREIGN JUDGMENTS—RECOGNITION—ENFORCEMENT

The commercial community will no doubt greet with satisfaction the decision of Diplock J. (as he then was) in *Blohn* v. *Desser* [1961] 3 W.L.R. 719, in which he held that the English courts will

recognise the validity of a judgment of the court of a foreign country against a non-resident debtor who, at the time of the action, was carrying on business at a place in that country through an agent resident there, in respect of a transaction effected by that agent in that country. The fact that the debtor was not personally resident or present in the foreign country did not deprive the foreign court of jurisdiction to entertain the action against him. This was the point of principle which Diplock J. resolved and on which there had hitherto been no direct authority.

The plaintiff had brought her action on (*inter alia*) the judgment of the Commercial Court of Vienna given in an action on a bill of exchange against an Austrian partnership firm. The defendant contended (*inter alia*) that the Austrian court had no jurisdiction to pronounce that judgment, which in any event was not final and conclusive against her personally. The facts were that the Austrian firm carried on business at a place in Vienna, where the managing partner was resident. The defendant herself was at no relevant time resident or present in Austria, but she was a partner in the firm, and had caused or permitted her name to be registered as such in the commercial register in Vienna. The bill of exchange sued on had been accepted in the course of the partnership business by the managing partner in Vienna.

On these facts, Diplock J. found that the defendant carried on business in Vienna, not in person, but through an agent resident there. Did this render her amenable to the jurisdiction of the Austrian court? The learned judge held that it did, for she must be taken by her conduct to have submitted to the jurisdiction of that court.

The decision is in line with the trend of authority in recent years in favour of the recognition of foreign judgments against a non-resident carrying on business at a place in the foreign country by himself or through an agent. It accords with the rule laid down in section 4 (2) (*a*) (v) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, which had been described by the Greer Committee which drafted that Act as "rational," and also with the American Restatement of the Law, Conflict of Laws, Draft No. 3 (1956), paragraph 85. The rule is also embodied in the Model Act respecting the recognition of foreign (money) judgments, which was adopted at the 49th (1960) Conference of the International Law Association. The learned editors of Dicey's *Conflict of Law* had, in the 6th (1949) edition somewhat tentatively, and in the 7th (1956) edition more confidently, favoured this view, on the ground that it would be commercially the more convenient rule.

What is the basis of the jurisdiction of the foreign court over a

non-resident individual carrying on business at a place within its territory through a manager or agent resident there? Is it to be found in an implied contract of submission, or in the conduct of the individual, irrespective of any such contract, express or implied?

Although he had himself formulated the question of principle entirely on the conduct of the defendant, Diplock J. nevertheless proceeded to hold that, in the circumstances of the instant case, there was an implied agreement of submission on her part. But is it either necessary or desirable to base the jurisdiction of the foreign court in the given circumstances on an implied agreement of submission? The American Restatement comments that the term " implied consent " in this context is a loose and inaccurate expression, and argues that the true basis of jurisdiction in the given circumstances is to be found in the *conduct* of the individual which by itself is sufficient to subject him to that jurisdiction irrespective of any consent, express or implied, on his part. This view has both force and convenience to commend it, and it provides a firmer basis, juridically, for the recognition of foreign judgments.

While recognising the validity of the Austrian judgment, Diplock J. nevertheless upheld the defendant's contention that it was not enforceable, since it was not a final and conclusive judgment against her personally. It was final and conclusive against the partnership firm, but it was inchoate against the defendant, for it required a fresh action against her personally in the Austrian court, when she could have raised defences personal to herself, *e.g.*, that she was not a partner at the relevant time. Applying the test laid down by Lord Bramwell in *Nouvion* v. *Freeman* (1889) 15 A.C. at p. 15, Diplock J. found that not all the possible controversies as between the plaintiff and the defendant had been concluded by the judgment against the firm.

This conclusion illustrates the difficulties inherent in actions against a partnership in the firm's name, in England as in Austria; for to make a member of the firm personally liable, it may be necessary to bring a separate action against him on the judgment against the firm, *Clark* v. *Cullen* (1882) 9 Q.B.D. 355, or to apply for leave to issue execution against him under R.S.C., Ord. 48A, r. 8. These difficulties are not due to defects of procedural law, and cannot be resolved by altering the rules of court, for they derive from the fact that a partnership has no separate legal personality.

Diplock J. concluded his judgment with these words: " Interesting questions might have arisen had the plaintiff, instead of suing on the judgment, sought to rely upon it as an estoppel by *res judicata* by way of reply to the defence to the cause of action on

the bill of exchange that it was accepted without authority, but this has not been pleaded and fortunately I need not consider it."

These remarks highlight the passive, even impassive, role of the courts of this country in civil suits. But is it satisfactory that a litigant might perhaps experience a sense of frustration in believing that, but for defects in his pleading, he might have won his case, instead of having lost it?

I. H. Jacob.

CONFLICT OF LAWS—WILL—FORMAL VALIDITY—WILLS ACT, 1861—PREVIOUS WILL—VALID ACCORDING TO LAW OF THE LAST DOMICILE OF DE CUJUS—COMPATIBILITY

When the Wills Act, 1861, provided a number of alternatives for maintaining the formal validity of wills of personalty made by British subjects, in addition to the common law rule, which relied on the law of the last domicile of the deceased, the possibility arose for the first time that two testamentary instruments which differed in substance might claim equal attention in English courts. The later will, valid in form under the Act of 1861 and purporting to revoke a previous will, may be met by an earlier one, valid in form and in substance according to the law of the last domicile, which determines the distribution of movables. In fact, no such situation seems to have arisen, until *Re Manifold* [1961] 2 W.L.R. 456; [1961] 1 All E.R. 710, except in one unreported case, and it need not have arisen at all, as will be shown below, if the wills are mutually exclusive.

The testatrix, whose domicile of origin was English, died domiciled in Cyprus. By a will made in 1957 in accordance with the formalities of Cypriot law, she disposed of all her properties and appointed the defendant executor. In 1958, by another will, she revoked the will of 1957 and disposed of her properties in a manner which differed somewhat from that expressed in the earlier will, and appointed the first plaintiff executor. This will was invalid in form according to Cypriot law, but valid according to English law. The first will was admitted to probate in Cyprus. Letters of administration with both wills annexed were granted in England to the two plaintiffs as attorneys of the defendant in respect of the estate in England. Upon a summons to determine the manner of the distribution of this estate, Buckley J. held that the funds should be applied towards the payment of the pecuniary legacies bequeathed by the second will and that the balance should be paid to the residuary legatees under that will, in disregard of the rights of the principal personal representative in Cyprus and irrespective of the provisions of the first will.

The case raised three questions (two of which, unfortunately, were not treated separately): the right of the foreign principal personal representative to a grant in England, the duty of the ancillary personal representative in England to transmit the residue to the former abroad and the effect of section 1 of the Act of 1861 upon the distribution of the estate.

In principle, where a person dies domiciled in a foreign country, leaving movables in England, a grant will be made to his personal representative under the law of that foreign country; if the powers of the personal representative under that law are less extensive than in English law, letters of administration with the will annexed will be granted as nearly as possible in conformity with those powers. Different considerations may apply if the testator made two wills disposing, respectively, of his assets in England and abroad, especially if the testator wished his English executors to have the powers given by English law (which may be wider than those allowed abroad). These considerations would appear to apply also where two wills are mutually exclusive because they are valid in different jurisdictions. Nevertheless, in the case of *I. B. Meatyard* [1903] P. 125, Sir F. Jeune P. granted letters of administration to the administrators appointed by the court of the last domicile of the deceased in Belgium on the basis of a valid Belgian will disposing of the Belgian assets, although the testator had, by a separate English will, valid under section 2 of the Wills Act, 1861, appointed executors in England in respect of his English estate. Perhaps the particular circumstances of that case rendered this course desirable, for the scanty facts suggest that the so-called Belgian administrators were in fact appointed in bankruptcy proceedings but, in principle, it is not in accordance with the practice evolved with two separate wills. It is even less desirable where the two wills are mutually exclusive and the English will prevails under the Wills Act, 1861. Yet Buckley J. followed *I. B. Meatyard* without further discussion.

However, at the stage of distribution, the English cases leave no doubt that the court has a discretion whether or not to permit the ancillary personal representatives in England to hand over the residue to the foreign principal administrator: *Re Achillopoulos* [1928] Ch. 433 at pp. 444, 445; *Re Lorillard* [1922] 2 Ch. 638 at pp. 645, 646. The rule has been criticised by Nadelmann (1951) 49 Michigan L.R. 1129 at p. 1148 in so far as insolvent estates are concerned. In these circumstances, however, the foreign personal representative is not claiming the residue for distribution among the beneficiaries, but among the creditors—see [1922] 2 Ch. at p. 642, *per* Eve J.

It was argued that, if the will of 1958 is recognised as formally

valid in England, with the result that the will of 1957 is disregarded, although it was valid in form and in substance in Cyprus, the English court would fly in the face of the law of the last domicile of the deceased, which governs the distribution of movables. Buckley J. disposed of this objection by referring to *Re Grassi* [1905] 1 Ch. 584. A will valid under section 1 or section 2 of the Wills Act, 1861, " will be regarded by the courts of this country as being a valid and effective disposition of the testator's property in accordance with its terms, to the extent that the law of this country allows this disposition to take effect. . . . " He could have added the necessary proviso that the will must not be illegal according to the law of the last domicile of the deceased. To go further and to identify the will of 1957, recognised as valid in substance and form in Cyprus, with the substantive law of Cyprus, which must be applied in England as the law of the last domicile, is fallacious. Testate succession is only controlled by the *lex domicilii* in so far as it determines the legality of the instrument, including capacity and, where applicable, the rights of the next-of-kin to a reserved portion. None of these restrictions applied here, for section 42 of the Wills and Succession Ordinance (Laws of Cyprus, 1950, s. 220) provides that a *de cujus* who was born or whose father was born in the United Kingdom may, whether domiciled in Cyprus or not, dispose of the whole of his movable and immovable property by will.

K. Lipstein.

A NOTE ON *ROOKES* v. *BARNARD*

INTIMIDATION—JOINT TORTFEASORS—TRADE DISPUTES ACT, 1906

Rookes v. *Barnard* [1961] 3 W.L.R. 438 (Sachs J. and now on appeal) raises a number of interesting points.

The plaintiff, a senior draughtsman who had been employed by B.O.A.C. in its design-office, claimed damages from each of the three defendants (Barnard, Silverthorne and Fistal) jointly and/or severally for using unlawful means to induce the B.O.A.C. to terminate its contract of service with him (whereby the corporation terminated the contract) and for an unlawful conspiracy to induce the corporation to injure him.

The plaintiff had belonged to a trade union, the A.E.S.D., of which the defendants continued to be members; but he resigned from it in November 1955 and it was his resignation that produced the trouble. The union having in 1951 obtained a 100 per cent. membership in the design office, the defendants and some other members of the A.E.S.D. determined to maintain the " closed

shop," either by forcing the plaintiff to rejoin the union or by getting B.O.A.C. to remove him from the design office. The plaintiff proved obdurate. Accordingly, at a meeting on January 10, 1956, of the London Airport members of the A.E.S.D., the passage was procured of a resolution in the terms " that if the non-unionist Mr. D. E. Rookes is not removed from the design office by 4 p.m. Friday, January 13, 1956, a withdrawal of labour will take place." B.O.A.C., notified of this resolution, suspended the plaintiff on January 13 and eventually dismissed him on March 16. It is not suggested in the report that B.O.A.C. committed any breach of its contract with the plaintiff. The jury found that each of the defendants was party to " a conspiracy to threaten strike action by members of the trade union against the corporation to secure the withdrawal of the plaintiff from the design office," that a threat to take such action was made by each of the defendants, and that the threats of strike action caused the suspension and dismissal of the plaintiff; and they awarded the plaintiff £7,500 damages.

The main misfortune of the defendants was that in 1949 there came into effect an agreement between the employers' and employees' sides of the relevant panel of the National Joint Council for Civil Air Transport under which representatives of several trade unions (including the A.E.S.D.) undertook on behalf of the employees that no strike would take place in consideration of the employers' undertaking that there would be no lock-out. Sachs J. held (p. 440) that " since the representatives of the A.E.S.D. were authorised by their executive to bind the trade union as a whole and the members individually the terms of the 1949 agreement became part of each contract of employment between the corporation and the members of the A.E.S.D." Accordingly, upon this view of the 1949 agreement, no member of the A.E.S.D. actually employed at London Airport could have come out on strike on January 13, 1956, except in breach of his legal duty.

It is not categorically stated in the report whether each of the three defendants was in the actual employ of B.O.A.C., but it is evident that Fistal, who was shop steward at London Airport, must have been, and it seems probable that Barnard was. Silverthorne, who was the A.E.S.D. divisional organiser over a large area and appeared to take a professionally leading part in the affair, may well not have been. As the distinction between a person actually employed and one who was not may be of interest, it is assumed in this note that Barnard and Fistal were employed by B.O.A.C. and that Silverthorne was not. Sachs J. further held that though there was a trade dispute in existence and all the acts complained of were done in pursuance of it, neither section 1 nor section 3 of the Trade

Disputes Act, 1906, gave protection to the defendants; and he entered judgment for the plaintiff for £7,500.

It is perhaps best to start by directing the student's attention to the most elementary aspect of that part of the tort of intimidation which can be regarded as reasonably well settled—the relevant definition of which has remained unaltered in, for example, Salmond since the first edition (1907, p. 441: compare 12th ed. 1957, p. 670), namely: " any person is guilty of an actionable wrong who, with the intention and effect of intimidating any other person into acting in a certain manner to the harm of the plaintiff, threatens to commit or procure an illegal act." To take what is believed to be an indisputable instance: should A say to B " I'll knock your head off if you lend a hand to C," C can sue A (if he has suffered damage through B's resulting inaction) even though the threatened battery is upon B and even though B was himself in breach of no duty in failing to assist C. [Throughout this note A will refer to the alleged intimidator, B to the person intimidated, C to the person whom A desires to damage.]

The student should observe that the primary act—the battery, the threat of which by A constitutes the intimidation—would if effected have been tortious as regards B and not as regards C: it is of itself no tort to C that A has elsewhere and separately assaulted or offered to assault the stranger B. It cannot be a condition of the tort of intimidation that the primary act must be such as of itself to give a cause of action to C also: if there were such a condition, the case above put would not be one of intimidation; and it evidently is. So even where the primary act is a tort, its relevant and sufficient characteristic, so far as intimidation is concerned, is that it should be wrongful as regards B. Indeed it is the curiosity of the tort of intimidation that C *appears to be given* a right of action in respect of an act which primarily is wrongful as regards B.

However, a little attention will show that the injury of which C complains is not that B has been assaulted or threatened to be assaulted but that there has been an improper invasion of the interest which he, C, has in the liberty of B. That invasion does not result from the mere wrongful act by A against B. It results from the successful attempt by A improperly to prescribe B's conduct in respect of C, to the detriment of C. The extent to which the law recognises the interest of C in B's liberty is necessarily limited: A evidently is, and must be, entitled to seek to influence B and even greatly to exert himself to do so. But it appears to be the law that A is not entitled to seek to prescribe B's conduct in

respect of C by the doing or the threatening of any act which constitutes a legal injury to B (or, probably, to others also). At any rate C has a well-established right to complain where the act done or threatened by A amounts to a legal injury of B. The nature of the injury with which A threatens B does not seem relevant: it does not matter, for example, whether personal violence is threatened or a trespass or the commission of a nuisance; what matters is that A should have sought to prescribe B's conduct by the threat of inflicting a legal injury upon him. Indeed the controversial question is whether C's right is slightly larger and whether he may not also sometimes—in cases, for example, of combination or conspiracy—complain of pressure exerted upon B otherwise than by legal injury or threat thereof.

That the ground of C's complaint is this interference with the liberty of B appears also from a consideration of the damage which C must prove to support his action for intimidation. B's act in not trading with C or in not entering into a contract with him—or, as in the case of B.O.A.C., in terminating its contract with Rookes—is not of itself wrongful as against C: B acts as he has a legal liberty to do. Indeed, if B's act also were wrongful in respect of C, A's tort would cease to be one of intimidation only (though it might continue to be an intimidation also) and he would become either a joint tortfeasor with B or liable for procuring a breach of contract by B, it depending upon the nature of B's wrongful act. But in the elementary intimidation case the damage which C alleges—the termination of the plaintiff's contract by B.O.A.C.—does not result from the wrongful act of B; it results from the exercise by him of his legal liberty. In the uncomplicated situation C shows that there has been an interference with the legal liberty of B, by way of an act wrongful as regards B done or threatened by A with the intention and effect of prescribing B's conduct as regards C.

If this analysis is correct, then taking the simplest instance presented in our case—that of Fistal—first and by itself, and assuming that he could not have come out on strike on 13 January except in breach of his legal duty under his contract with B.O.A.C., it would seem that the threat personally addressed by him to B.O.A.C. that he would so come out on strike unless B.O.A.C. dismissed Rookes was (subject to any defence under the Trade Disputes Act), actionable by Rookes upon proof that that threat did cause Rookes' dismissal. It is respectfully submitted that, on the elementary point thus isolated, Sachs J. was right in saying (p. 444):

> " It has long been regarded as settled at common law that it is an actionable wrong to intimidate other persons to make them act in a manner which they themselves have a legal right to do

> but which is likely to result and does result in loss to the plaintiff. It is equally well settled that a threat to do or to procure the commission of an unlawful act constitutes such intimidation. . . . As regards threats to break a contract it seems to my mind . . . that they come within the category of unlawful means in relation to conspiracy and unlawful acts in relation to intimidation."

The most elementary point determined by Sachs J. appears to be that the threat by A to B that A will commit a breach of his contract with B unless B acts to the damage of C may constitute a sufficient intimidation of B to entitle C to sue A if B does act as directed. This determination is, it is respectfully suggested, at least prima facie correct: it is consonant with authority and with the appropriate analysis of the tort of intimidation. A threat by A to break his contract with B may indeed be a formidable engine of persuasion. It is indubitably a threat of legal injury by A against B. That the breach if committed would be actionable only by B is not a distinguishing peculiarity of this threatened legal injury—it is the case generally in intimidation. It would seem right that the law should have regard to the unlawfulness of the conduct actually threatened: that is an appropriate criterion and a clear and precise one; and it is particularly desirable to have such a criterion (so far as it may be possible) in an area where passions run high. [What is suggested here is that a threat of legal injury is sufficient to constitute an intimidation. I must not be taken as contending that intimidation should be limited to the threat of legal injury only, or that it is.]

However, the determination of the elementary point is by no means the end of the matter. It deals perhaps with the case of Fistal on the supposition that he was actually employed by B.O.A.C., but only if (a) Rookes can show that Fistal's threat caused his dismissal and (b) there is no defence under the Trade Disputes Act.

As to (a): It is improbable that B.O.A.C. was successfully coerced to dismiss Rookes by the mere threat of Fistal only. Common sense suggests that Rookes was dismissed because of the pressure exerted upon B.O.A.C. by the combination of the threats of Fistal and numerous other persons, organised and backed by the officials of A.E.S.D. Upon what basis can Fistal be made responsible for the result of the collective action of the members of A.E.S.D.? The precise nature of the combination and of its operation may turn out to be not without importance with reference to the Trade Disputes Act also.

Sachs J. deals with this question at p. 445 where he says:

> " I do not think it can be said that where fifty men each make

> the same threat foreseeing that others would probably do so as well and that the cumulative effect would be to cause damage—even when they have not made a prior agreement with the others to make such threats—each can in turn be heard to say that no one of them had actually caused the damage and that, accordingly, no tort had been committed at all. In the present case, moreover, the form of the resolution was such that each of those present authorised the defendant Fistal to convey to B.O.A.C. not only his own threat but the threats of each of the other members of A.E.S.D., and thus actively authorised the making of his own threat in such a way that the threats of the others were bound to be simultaneously taken into account."

It should be noted that Sachs J. makes no distinction as to the mode of their participation between the members of A.E.S.D. who were, and those, if any, who were not, actually employed by B.O.A.C. If (as it is assumed) Silverthorne were not employed by B.O.A.C., the threat which he may have made to B.O.A.C. is, with respect, not the same as the threat made by Fistal. In particular it does not include the threat to commit a breach of any contract of his own; and that threat we treated as critical in Fistal's case because it plainly constituted a threat of legal injury.

I propose to put aside for the moment Silverthorne's participation as that is at the least more complex. As regards the participation of Fistal and Barnard—*i.e.*, of the members of A.E.S.D. actually employed by B.O.A.C.—Sachs J.'s proposition is interesting and, if it may respectfully be said, instructive. He does not regard each member of the A.E.S.D. as inciting or procuring the other members to commit breaches of their contracts: in his view the members of the A.E.S.D. do not necessarily participate in a common undertaking of jointly procuring every breach of contract. What he does suggest is that there has been a linking of the threats. So far at least as the employed members of the A.E.S.D. are concerned, they have arranged jointly to intimidate B.O.A.C. by confronting B.O.A.C. with a concerted series of threats, though the threat of each may be to commit each a separate and several breach of his own contract. That is evidently a realistic view of the facts: the object of the London Airport meeting was not to incite or procure reluctant law-abiding citizens to commit breaches of contract—indeed it is to be doubted whether that aspect of the matter was prominent in anybody's mind—but to organise and co-ordinate the notice to be given to B.O.A.C., so that the pressure of numbers could be successfully exerted upon B.O.A.C. Is this realistic view of the facts a legally possible one? Is it legally possible to join in a conspiracy to intimidate so as to be a participator in the tort of intimidation without joining in what we have called the primary act—the battery in the example given—so as to

be joint-tortfeasors in respect of the primary act also (when that act is a tort)?

No doubt persons who join to intimidate another would often join also in aiding each other in the commission of the wrongful act threatened: the joint threat of battery may well normally also be the threat of joint battery. But it need not necessarily be: to suggest that it must be is but another instance of the undistributed middle. The analysis of the tort of intimidation above proposed has indicated that the nature of the legal injury with which A threatens B is not critical. For the purpose of damaging C, A^1 can severally threaten to assault B, A^2 maliciously to prosecute him, A^3 to defame him, A^4 to daub his house. Each, if successful, would be severally liable at the suit of C for the tort of intimidation. Add now the good offices of a go-between. Each A, having already decided upon his course of action, is informed of the decision of the others and authorises the go-between to communicate his own decision simultaneously with that of the others in order to maximalise the pressure upon B. Surely in this situation, *whether or not* each A becomes a joint tortfeasor with each other A in the assault, malicious prosecution, defamation and trespass threatened (and it is at least doubtful if A^1 has in any way procured or incited or aided and abetted A^2 for example in his malicious prosecution about which he has had no communication whatever with him), there has certainly been a combination of the unlawful threats, with the intention and effect of more efficiently injuring C.

That which gives C his cause of action in intimidation against A is not A's assault as such upon B but the offer of A improperly to prescribe B's conduct in respect of C: similarly the relevant combination, so far as C is concerned, is not the joinder in the assault but the joinder in the improper prescription. So far as the primary act of the assault is concerned, the A.s are no doubt joint tortfeasors if, and only if, they can be sued jointly by B; but so far as C's right of action for intimidation is concerned, the precise manner in which B has been threatened with injury is, it has been suggested, irrelevant, provided legal injury was threatened. Even if the A.s happen to be joint tortfeasors as regards B, so far as C is concerned he can sue them jointly as tortfeasors only if they have also joined in injuring him. So for example, if A^1 and A^2 threaten to assault B if he continues to associate with C, and if B backsliding in this particular is actually beaten up by A^1 and A^2 aided by A^3 who has no knowledge of the previous threat but joins in for the pure pleasure of kicking the underdog, B no doubt can sue A^1 A^2 and A^3 jointly for the assault but it does not follow that C can sue them jointly for intimidation. And conversely it does not appear

to be a condition of C's right to sue A^1 A^2 and A^3 jointly for intimidation that B should be able to sue them jointly for some separate and different wrong. So in the case of *Rookes* v. *Barnard* it would seem irrelevant whether or not B.O.A.C. could have sued Fistal and Barnard jointly for possible breaches of their several contracts or whether each would have been responsible to B.O.A.C. for the breach of the other's contract upon ground of having procured it—indeed *non constat* that there was any such procurement: it is enough, so far as Rookes and *his* action against them jointly for intimidation is concerned, that they combined to co-ordinate their several unlawful threats and by that combination succeeded in giving their several unlawful threats the power necessary to prescribe B.O.A.C.'s conduct in relation to Rookes.

If the relevant joinder in the tort of intimidation is a joinder in the co-ordination of the several unlawful threats and not necessarily a joinder in the unlawful acts threatened, an interesting question arises about the mere go-between: the person in Silverthorne's case who, on our assumption, has not himself threatened to do as against B any act unlawful in himself. Silverthorne has not threatened himself to commit a breach of his contract with B.O.A.C. because by hypothesis he had no contract with B.O.A.C.; but he has undoubtedly helped, and powerfully, to make effective so far as Rookes is concerned the unlawful threats of Fistal, Barnard and others. His intervention has been effective irrespective of whether he would himself have been responsible so far as B.O.A.C. is concerned for any breach of contract which Fistal and Barnard might have committed or whether he can be regarded as having procured the breaches of Fistal and Barnard's contracts. Whatever other wrongs he may, or may not, have committed, the question is whether he has aided and joined Fistal and Barnard in the tort of intimidation committed by them—in the tort which is actionable by Rookes, not by B.O.A.C.: is he in respect of that tort a joint tortfeasor with Fistal and Barnard? To the question so asked, the answer is not in doubt: Silverthorne has busied himself to secure the perfection of Fistal and Barnard's tort of intimidation, and that degree of participation is more than sufficient to constitute him a joint tortfeasor together with them in that tort.

As regards (a) therefore it would appear that Rookes can make out that Fistal caused his dismissal by B.O.A.C. on the ground that Fistal was a joint tortfeasor with Barnard and Silverthorne and others in circumstances which made each responsible to Rookes for the totality of the damage which the joint operation caused him. It is no doubt marvellous to an academic lawyer that in the rough and tumble of a jury action the issues should be formulated even

approximately correctly; and the formulation by Sachs J. was, it has been suggested, both interesting and instructive. Nevertheless on appeal it would be desirable that the distinction between Silverthorne and the others, if there is one, be attended to and the nature of the participation of each further examined.

As to (b)—whether the Trade Disputes Act, 1906, will operate to absolve the defendants' tort, it being admitted that they had acted " in contemplation or furtherance of a trade dispute "—the student will not need warning that he should go warily. Curious effects are likely to be produced by the application of the English rules of construction to any statute, and ones very curious indeed may be expected when the statute is itself as highly peculiar as this Act. No doubt it would be prudent to await the decision of the House of Lords, though it is most improbable that that will give any general satisfaction.

However, on the more pedestrian level, it would seem that section 1 of the Act is not relevant because the act of which Rookes complains—the obtaining by unlawful means of his dismissal by B.O.A.C. —is an act which is actionable if done by a single individual. Section 3 is double-barrelled: it provides first that an act done by a person " shall not be actionable on the ground only that it induces some other person to break a contract of employment." It is to be observed that Rookes in his statement of claim, as set out in the report, did not allege any procurement of any breach of contract by anybody, let alone founding his action exclusively upon any such procurement. *Non constat* that there was any such procurement; and if there were, it would seem irrelevant to Rookes' action as formulated. He does not complain that Barnard procured or induced Fistal to commit a breach of Fistal's contract: he complains that Barnard sought unlawfully to intimidate B.O.A.C. by threatening a breach of his own (Barnard's) contract, and Fistal similarly, that they joined each other in this intimidation and that others aided and assisted them in the joint intimidation. Furthermore in an action founded *exclusively* upon the procurement of a breach of contract it would seem that the only possible plaintiff is the person against whom the procured breach of contract is committed; and Rookes was not complaining of the breach of any contract with him. This part of section 3 might afford protection to a hypothetical Silverthorne concerned exclusively, by means lawful in respect of them, to induce employees of B.O.A.C. to break their contracts with B.O.A.C. if B.O.A.C. was to sue such a Silverthorne; but it was not B.O.A.C. who was suing; and Rookes, who was suing, was not concerned with that aspect of the actual

Silverthorne's activity (if in fact it existed) and was concerned with the intimidation to his own damage of B.O.A.C. itself.

The second part of section 3 provides that an act done by a person " shall not be actionable on the ground only . . . that it is an interference with the trade, business, or employment of some other person, . . ." Rookes was certainly claiming that his trade, business or employment had been interfered with by the acts of the defendants, and the only head of damage which he appears to have alleged is damage resulting from that interference. But does this part of the section give a general dispensation to persons in the case of Barnard, Fistal and Silverthorne in respect of actions by such as Rookes? So far as the damage to Rookes and his right of action is concerned, the nature of the injury threatened or done to B.O.A.C. is, as we have seen, irrelevant. Rookes' right of action (if he has any) would still have been for interference with his trade, business or employment even if the means of persuasion adopted by Barnard and his companions had involved the plainest violence to the property or personnel of B.O.A.C. Would Rookes still have been without a remedy in such a case also? The better answer appears to be: No. A man would seem to have a right of action today against persons who have caused him to lose his job by threatening his employer with personal violence if he is not dismissed, even if those persons were thereby seeking to further a trade dispute in which they were concerned. But if that is so, it must mean that an action for intimidation by the workman thus damaged is not an action " on the ground only " that his trade or employment has been interfered with: for if it were, section 3 would protect the persons threatening personal violence also. Thus Rookes too was not suing " on the ground only " that there had been an interference with his employment; he was suing the defendants because they had joined in causing B.O.A.C. by unlawful threats to damage him in his employment.

There is indeed nothing in the Act which would indicate that its policy is to condone violence or intimidation, and even section 4, though it protects the funds of the union, does not excuse the tort in the person of the tortfeasor. It may well be, as Sachs J. suggests, that the purpose both of this part of section 3 and of section 1 was to resolve in favour of the unions the then highly disputed matters regarding what constituted a wrongful interference with the trade, business or employment of another and to establish that the mere fact that there was an interference would not of itself give rise to a cause of action against persons causing that interference if they acted, whether individually or in concert, in furtherance of a trade dispute. It would certainly be odd if this part of section 3 gives a

general protection against *tortious* interference with trade, business and employment generally when the first part of the same section is careful to spell out a very limited protection in respect of a particularised tort having reference to the contract of employment—the procuring of a breach of such a contract. Indeed I venture—with all proper reserve—the suggestion that not even the first part of section 3 is apt to protect the intimidator. Though the first part protects A against an action by C if A by means lawful as regards B persuades B to break his contract of employment with C, it is suggested that, even within the first part, C may sue A if A has used violence or other unlawful threats to cause B to break his contract with C: for the reason that even in such a case it would seem that C's cause of action is not founded " on the ground only " that A has procured a breach of contract by B. It is founded on the additional and essential ground that A has used means unlawful in respect of B to cause B to break his contract; and such an allegation of unlawful means is unnecessary and would be irrelevant in the normal action for procuring a breach of contract. Similarly it is suggested that Rookes' cause of action is not " on the ground only " that his employment has been interfered with: it is founded on the additional and essential ground that Barnard Fistal and Silverthorne have combined to use unlawful threats to cause B.O.A.C. to disturb him in his employment.

No doubt a great deal more will be heard about Rookes' temerity in seeking by this action to call into question the conduct of his former fellow trade-unionists. It is not the purpose of this note to discuss whether it was wise of him to do so, nor whether it is desirable that persons in Rookes' case should be allowed a legal redress. Its purpose is simply to enable a student better to appreciate the analysis of the tort of intimidation which Sachs J.'s most interesting judgment formulates or suggests—assuming, as he decided, that the collective agreement of 1949 did put a personal duty upon the individual defendants or some of them.*

C. J. Hamson.

* I had the opportunity, before writing this note, of seeing an early draft of the very learned article upon this case by Mr. Wedderburn which is now published in the *Modern Law Review* (Vol. 24, p. 572, September 1961). I refer to it the diligent student who may wish to have an appraisal of the case somewhat different from that here attempted.

THIRTEENTH-CENTURY CONVEYANCING FROM THE CHARTER ROLLS

S. J. Bailey

The Charter Rolls of the thirteenth century are not solely concerned with Royal grants. They contain a large number of conveyances made by the King's subjects. These conveyances, or charters, owe their preservation here, as a rule, to the fact that they were submitted to the King for his inspection and confirmation.[1] Many of them are quite complicated examples of conveyancing, replete with descriptions of the land concerned, of the estate granted, and of the services or consideration reserved by the grantor. But perhaps their most striking feature is the list of witnesses with which each charter concludes.

1. The Witnesses to Private Charters

Although it would seem that these witnesses neither signed nor sealed the charter in which they were named, the very fact that their presence is recorded shows that they were considered to be an important element in the transaction. That this was so is shown also by an obvious preference for witnesses of high standing. Rarely does a charter fail to include several eminent men in its list of witnesses; and in fact, if we except the modest clerk who relegates his own name to the foot of the list, it would seem that the custom was to name the witnesses in order of merit. Thus if the Justiciar or the Chancellor is a witness, his name will come before mere knights; and these, in turn, have precedence over lesser people.[2]

Some seventy years ago Maitland called attention to the lists of witnesses named in the Royal charters of this period, and urged their historical importance.[3] In the same way one may expect to find in the witnesses to private charters some evidence of the circumstances in which the King's subjects were accustomed to convey their lands.

[1] Compare T. D. Hardy's introduction to *Rotuli Chartarum*, pp. vii–viii, which implies that the *inspeximus* confirmation was not applicable to private charters. His volume contains only charters of King John, whereas this article concerns chiefly those of 11 Henry III onwards.

[2] Madox, *Formulare Anglicanum*, p. xxxii, gives the normal order as "first were named Kings or Queens; then . . . Prelates; then the Temporal Nobility, and others."

[3] 8 E.H.R. (1893), 726–728. See also Maxwell-Lyte, *The Great Seal*, 234–237, for the difficulties which these lists present.

Seldom do we find the King acting as witness to a private charter (though his relations and his Queen are not infrequent witnesses); and if a charter secured the rare honour of his presence, it was more likely to record the fact by an express clause [4] than to include him in the list of witnesses.[5] His Chancellor, however, is a comparatively frequent witness to private charters: thus Robert Burnel, Bishop of Bath and Wells,[6] and Ralph de Nevill, Bishop of Chichester,[7] are named as witnesses much more frequently than most of their contemporaries. But men who hold, or have held, office as King's Steward are by far the most frequent witnesses of all. In the first two volumes of the Calendar of Charter Rolls I have noted some eighty-five instances of this [8]; and there may well be many more, for their official title " Steward of the King " is rarely appended to their names. Moreover, the charter of a great landowner is likely to include his own steward as a witness,[9] just as the most constant witnesses to Royal charters are the King's household officers headed by his stewards.[10]

The majority of the private charters to be found in the Charter Rolls appear to be conveyances by the King's tenants in chief. It is not surprising, therefore, to find the King's officials witnessing these documents, with the stewards taking the most prominent part. Yet it is clear that all Royal officers were not equally appropriate or attractive witnesses—*e.g.*, the justices of the forest seldom witnessed a charter. Obviously the King's stewards were either the most desirable or the most easily obtainable witnesses for private persons: and it would seem probable that the frequency of their testimony is due to both these causes.

This line of reasoning, moreover, is likely to explain the occasional predominance of other types of witnesses. Thus dignitaries of the Church are often strongly represented when ecclesiastical bodies are concerned in a conveyance. The transactions of earls and great men tend to attract witnesses of their own status. Conveyances of London land are witnessed as a rule by the Mayor or Keeper of the city, together perhaps with two sheriffs, the alderman of the ward wherein the land lay, and other citizens.[11] And a similar predominance of local officials may be expected in the charters of other boroughs.[12]

[4] Calendar of Charter Rolls, I (1226–1257), pp. 243, 249–250 (2); *ibid.*, II (1257–1300), pp. 3, 287–288, 289.
[5] C.Ch.R.I, 192 (1235).
[6] C.Ch.R.II, 188, 191 (2), 218, 248, 254, 261, 267, 351, 356, 357, 366, 421, 430.
[7] C.Ch.R.I, 72–73 (4), 76, 186, 189, 192, 220.
[8] These do not include the many *Royal* charters witnessed by stewards and other great men.
[9] *e.g.*, C.Ch.R.I, 372, 373, 385, 408; *ibid.* II, 25, 140, 156, 204, 208, 241, 410, 412, 430.
[10] Maitland, 8 E.H.R. 727.
[11] C.Ch.R.I, 79, 307, 407–408, 418–419; *ibid.* II, 77–79 (3), 245, 253, 434.
[12] *e.g.*, *ibid.* II, 415 (Oxford), 468 (Nottingham); Madox, *Formulare Anglicanum*, No. 163 (Suthamton).

In view of this evident desire for powerful testimony, one might naturally expect to find the King's Justices in some demand as witnesses to private charters. Yet it would seem that they were comparatively rare witnesses. The Justiciars, Hubert de Burgh (11), and Stephen de Segrave (13) appear to have acted frequently in this capacity; but ordinary justices averaged less than three documents apiece. Moreover, even when justices are included in a list of witnesses it is unusual to find any hint of their official designation. I have noted only seventeen private charters wherein a witness is described as " justice," [13] and, of these, seven referred only to the Justice of Chester and one to the Justices of the Jews.

It would seem, therefore, that the King's Justices were seldom present in an official capacity at the making of these private conveyances. No doubt it was already notorious that the weight of their testimony could be secured by levying a fine in the King's Court. In fact the Charter Rolls of the thirteenth century themselves record several instances in which such fines and agreements in court were submitted to the King for his inspection and confirmation [14]; and it is somewhat startling to see transactions of so high a nature subjected to this treatment, for it suggests that in some respects they were no more secure than ordinary conveyances and agreements made before witnesses out of court.

These imposing lists of witnesses suggest several lines of inquiry. In the first place, how came it to pass that the parties to a conveyance were able to secure the presence of important men at the making of their charters?

One can hardly suppose that men of substance were willing to take horse at the beck and call of anyone who desired an influential attestation clause. It is far more likely that parties who wanted an important person to witness their transactions could achieve their purpose only by seeking him out and by making their conveyances or documents in the place where he happened to be. But

[13] C.Ch.R.I, 114, 132, 281, 440–441; *ibid.* II, 126, 127, 208, 256, 412. The Justice of Chester is given as a witness in I, 115, 247, and in II, 310, 311, 317, 338, 418; the Justices of the Jews are named in II, 253. See also Madox, *Formulare Anglicanum*, No. 635 (circ. 1259) for a writing obligatory witnessed by five Justices in Eyre.

[14] C.Ch.R.I, 68–69, 204, 228–229, 260–261, 458; *ibid.* II, 166 (1271—inspected but not expressly confirmed). Some of the very earliest 12th-century fines were confirmed by Royal Charter at once (J. H. Round, 12 E.H.R. 298–299), so also were earlier analogous transactions (*ibid.* 300–301). *Cf.* T. D. Hardy, *Rotuli Chartarum*, pp. vii–viii; " the King can only *recite* the judgment of a court . . . but he *cannot confirm* . . . [it]; nor do such matters require any confirmation at his hands." Evidently this opinion was not held in the first 60 years of the 13th century, but it received support in 1271 (the fine not expressly confirmed, *supra*).

even this can hardly account for the frequent inclusion of a number of influential names in one and the same charter. Such a plurality of high witnesses compels the conclusion that the document was made or completed in a court or in some gathering at which great men were present—presumably upon business of state.

Madox has collected examples, chiefly from the Pipe Rolls, which show clearly enough that feoffors were accustomed to complete their conveyances before an official tribunal. Many a charter, it seems, was either made, read or acknowledged before the Barons of the Exchequer [15] or before the King's Justices whether in Eyre or at Westminster [16]; and the Charter Rolls provide several additional instances of such procedure.[17] In fact even the feudal ceremonies of homage and fealty whereby a feoffment was completed might well occur *in curia Domini Regis* or *coram Baronibus de Scaccario*.[18]

It was no uncommon thing, therefore, to find a charter in the precincts of a court, or to see it sealed or ratified there.[19] Indeed it is more than likely that such charters were often actually drafted in or near the court; for, apart altogether from the difficulty of finding an experienced conveyancer elsewhere than in official circles, it is noteworthy that many charters expressly allude to the presence of the Barons or justices.[20] And even those which merely include such dignitaries in the final *hiis testibus* clause (whether with or without their official designations) appear to have been no different in this respect; for, if Madox is to be believed, this final clause was contemporaneous with the body of the charter itself—it was no mere afterthought inserted by another hand.[21]

If this hypothesis be accepted, the presence of eminent men among the witnesses to the private charters of the Charter Rolls is readily explained. If it were customary to conduct conveyancing business in the vicinity of courts and similar gatherings, one can understand why men were able on occasion to include the Justiciar, Chancellor, Stewards, Justices, or even the King himself in the *hiis testibus* clauses of their documents.[22] In like manner a group of ecclesiastical witnesses suggests a meeting of some ecclesiastical tribunal [23]; the Mayor of London with his Sheriffs and Alderman of the Ward point to the Court of Hustings [24] ; and occasionally a list

15 *Formulare Anglicanum*, pp. xi–xiii.
16 *Ibid.* pp. xi–xii, and No. 675.
17 See, *e.g.*, note 13, *supra*, and note 25, *post*.
18 Madox, *op. cit.*, xiii.
19 See also Holdsworth III, 235.
20 Madox, *op. cit.*, xi–xiii, xxxi, 635, 675; *supra*, notes 13 and 14; *post*, note 25.
21 Madox, *op. cit.*, xxxi.
22 *Supra*, notes 4 to 10; and Madox, *op. cit.*, xxxi–xxxii.
23 *e.g.*, C.Ch.R.I, 53, 123.
24 *Ante*, note 11. This court exercised considerable jurisdiction over London lands: *Liber Albus*, Bk. III, pt. I, ff. 182b–184a.

of witnesses is headed by the names of high officers of the King's Exchequer.[25] Moreover Bracton's treatise supports this theory for he advised that private charters be read in some public place, such as a county court or court of the hundred.[26]

Nevertheless, the private charters enrolled in the Charter Rolls rarely state expressly that they were made in any particular court or assembly. And, as already mentioned, it is somewhat unusual even to find an express mention of the office which a high witness held. In particular, one seldom finds a charter in which a witness is expressed to be the sheriff of a county,[27] or indeed any hint that it was made in a county court. It would therefore appear that although the parties to a conveyance would often secure an imposing array of witnesses by making or reading their charters in some court where great men were available for the purpose, as a rule such transactions formed no official part of that court's proceedings.

Perhaps in this connection a distinction should be drawn between those charters which state that the conveyance occurred *coram* certain officials, and those in which the officials are mentioned only by the *hiis testibus* clause. The former suggests procedure before a formal tribunal, whereas the latter relegates the official personage to the company of ordinary witnesses, and therefore suggests, especially when his official designation is omitted, that his attestation was an unofficial one—given perhaps after his formal business was over. This suggested distinction may be illustrated by an undated writing obligatory, which appears to come from the year 1259 or thereabouts.[28] It recites that A was fined by Justices in Eyre and that B became his surety before (*coram*) them. A therefore gives B this written undertaking to indemnify him against any liability thereon. The *hiis testibus* clause on this occasion contains only five names, and adds that these five were the Justices in Eyre. The strictly official function of the Justices would appear to cover only the imposition of the fine and the acceptance of the surety. That the surety will be indemnified by A does not directly concern our Lord the King.

Incidentally it may be interesting to observe that habitual resort to the precincts of a court, in order to secure an experienced draftsman and the weighty testimony of powerful witnesses, may gradually evolve a method of conveyancing whose origin will puzzle the

[25] *e.g.*, C.Ch.R.II, 50 (Treasurer, Chancellor and Baron), 119 (Treasurer, Chancellor, Marshal and Baron).

[26] *De Legibus*, f.38, "*ut facilius probari possit.*"

[27] C.Ch.R.I, 62–63 (Sheriff of Lincs); II, 123 (Sheriff of Kent); 311, 317 (of Chester); 468 (of Nottingham).

[28] Madox, *op. cit.*, No. 635. See also *ibid.* No. 675 (1236) for a document not witnessed by Justices, which confirms a release made *coram* four specified JJ. in Eyre.

historians of a later age. If the Justices who hold that court are the most powerful and desirable witnesses, and if in their official character as Justices of our Lord the King in session their testimony is even more potent than is their attestation in a private and unofficial capacity, men are likely to seek some method of ensuring that their conveyances will secure a place in the regular procedure of that court. Moreover, if by such a method one can secure the services of an experienced official to draft the ultimate conveyance, yet another obvious advantage is obtained. Surely the action compromised—the Fine—was the obvious way of securing such advantages as these, even had it lacked its further attractions of enrolment and preclusive bar. And so what had begun in the twelfth century as a method of compromising hostile litigation was ready for use in the thirteenth as a powerful conveyancing device, based upon a fictitious quarrel.

That a court, and more especially the King's Court, was considered the natural environment for conveyancing practice is suggested by many entries in the charter rolls of the thirteenth century. But perhaps the clearest statement of this idea is to be found in a covenant for further assurance contained in a private charter which the King inspected and confirmed in 1269. The vendor expressly covenanted in this conveyance " to make . . . any assurances which . . . (the purchasers) . . . and their friends shall provide, either in the King's Court or before the justices in eyre." [29]

When we come to speculate upon the reasons which prompted men to seek important witnesses for their charters, there is, of course, the obvious answer that a great man's testimony is likely to be of greater weight than that of lesser folk. If litigation arose as to the genuineness of a charter, the witnesses whose names were written at the end of that charter might be summoned with the jury of neighbours empannelled to decide the question [30]; an influential witness is clearly an invaluable ally in such an environment. Moreover, perhaps we may add that if our witness be sufficiently powerful, his influence may support the charter sufficiently to prevent threatened litigation altogether, or to render it unnecessary [31]; and, if such litigation begins, the sight of an imposing list of witnesses may wring a hasty compromise from the party who had intended to deny the validity of the charter.

An interesting example of the force of the King's testimony on such occasions occurred in the middle of the thirteenth century with

[29] C.Ch.R.II, 117–118.
[30] Pollock and Maitland II, 626 and examples there given.
[31] *e.g.*, charters which expressly empower the King or his ministers to enforce them by distraint—see C.Ch.R.I, pp. 192 (made in the presence of King) 187 (sealed with King's seal); II, pp. 165, 401–402.

reference to the manor of Midleton or Milton, Cambs. Godfrey de Craucumb acquired this manor with its advowson in 1227.[32] In 1244, or thereabouts, he married Joan de Somery, a widow, who came to him with the Cambridgeshire manor of Haselingfeld as her dower.[33] Soon after their marriage he made known that she was to have his manor of Milton also, by way of dower, if she survived him; and accordingly in 1245 the sheriff of Cambridge received orders to protect her possession of it in that event.[34] Then her husband conveyed this manor of Milton to Robert de Muscegros.[35] The validity of this conveyance was disputed by Godfrey's heirs after his death on the ground that he was insane at the time he made it. But, in the meantime, Joan had contracted a third marriage—with Sir Ebulo de Montibus; and accordingly we find her with Sir Ebulo in 1253 obtaining the King's grant that she have her dower from the deceased Godfrey's lands.[36] Indeed it would seem that she had already obtained a firm grip on the manor of Milton with which Godfrey had endowed her as above, for she had bought the fee simple from Robert de Muscegros three years previously.[37]

Nevertheless her title was disputed by Godfrey's heirs in the King's Court at Westminster, who alleged that Godfrey was not of sound mind when he conveyed the manor to Robert—her predecessor in title. Unfortunately for the plaintiffs, however, Sir Ebulo and Joan were able to produce a testification from the King to the effect that Godfrey had made this feoffment " before the King at Pidinton, when the said Godfrey was *compos mentis*." [38] The plaintiffs thereupon made a chirograph in court relinquishing their claims, with a release to the same effect enrolled in the rolls of the Chancery.[39]

In 1268, some fifteen years later, the heirs of Godfrey made a similar attempt to reclaim lands which he had granted to the prioress and nuns of Stodleye; and again the King testified " that he well remembers that the said Godfrey in his liege power conferred upon them the said manor " and that he was sane at the time. But on this occasion the letters patent show a possible cause of bias in the Royal memory, for they add that Godfrey had prayed the King to maintain the prioress and nuns in their seisin, and that when he made this request Godfrey " conferred the residue of his land upon the King." [40]

[32] C.Ch.R.I, pp. 44, 94.
[33] *Excerpta e Rotulis Finium*, I, 412; C.Pat.R. (1244), 419.
[34] C.Pat.R. (1245), 450.
[35] C.Pat.R. (1250), 79.
[36] C.Close R. (1253) 404; C.Pat.R. (1253), 220.
[37] C.Ch.R.I, 347 (1250).
[38] C.Pat.R. (1250), 79; *Exc. e Rot. Fin.*, II, 127.
[39] C.Pat.R. (1253), 239.
[40] C.Pat.R. (1268), 201.

2. Royal Confirmation of Private Charters

A lawyer is naturally inclined to suspect that formalities in conveyancing are adopted only in order to satisfy courts of law in the event of litigation. Yet, when one remembers that all these charters with which we are now concerned were to be presented to the King for his inspection and confirmation, it would seem likely that the parties selected witnesses as eminent as they could find in order the more easily to satisfy the King that the alleged transaction had in fact occurred and was therefore worthy of his ratification. Moreover, it appears that the parties to a charter regarded its inspection and confirmation by the King as something more than a mere licence to alienate lands held in chief or to grant into mortmain; for there are several transactions recorded in the Charter Rolls which show that such confirmations were considered to give an added validity to the conveyances and agreements so confirmed.

Occasionally a conveyance by a tenant in chief recites that the King has already given his licence to assign, but nevertheless is subsequently presented to the King for inspection and confirmation.[41] Sometimes the rolls record the date of a charter so inspected and confirmed, and we may find that many years elapsed until the grantee felt the need to obtain a Royal confirmation,[42] though in normal cases the period is a short one. Religious houses, with their many lands, often obtain several ratifications of the same grants, and are anxious to procure a general clause in the King's charter of confirmation to cover all the lands they have obtained.[43] Sometimes, moreover, a man who had cause perhaps to fear that he or his lord had incurred a forfeiture of the lands which he held, obtained several grants or confirmations of his estate by Royal charter.[44] At times, again, we have glimpses of a lord confirming conveyances made by his tenants,[45] or of heirs confirming those of their ancestors.[46]

It would therefore seem that these confirmations were regarded as a method of strengthening the title of a purchaser. At the least they would appear to preclude the confirming party from questioning the existence and validity of the conveyance[47]; and, if that party be the King or the lord of the fee, an action in his court by

41 *e.g.*, C.Ch.R.II, 190 (1275), 366 (1290); or the licence may be given separately by Letters Patent, *e.g.*, C.Pat.R. (1277), 199.
42 *e.g.*, C.Ch.R.II, 403 (12 years).
43 *e.g.*, C.Ch.R.II, 102–106, 237; C.Ch.R.I, 3, 17, etc.
44 *e.g.*, Godfrey de Craucumbe—C.Ch.R.I, 39, 44 (1227), 94 (1229), 181 (1233). Hubert de Burgo, *ibid.*, 248 (1239).
45 *e.g.*, C.Ch.R.II, 317, 338, 339, 353, 373, 412, 452, etc.
46 *e.g.*, *ibid.*, 217, 310, 317, 441–443, 447, 452, 458–460, etc.
47 This is supported by the occasional appearance in confirming charters of words such as "provided it be not to the King's damage"—*e.g.*, C.Ch.R.III, pp. 461–462 (2). See also Bracton, ff. 382b, 388b–389.

a vendor who denied the conveyance so confirmed could have little, if any, chance of success.

Another manifest advantage to be gained from a Royal confirmation of one's conveyance was the resulting record, preserved among the charters of the King, which in effect *registered* the substance of the transaction.[48] And even a confirmation given by a mesne lord could secure this privilege of enrolment, with its attendant guarantee against the denial or destruction of the charter of conveyance: for the charter by which the lord confirmed his tenant's assurance might itself be inspected and confirmed by the King.[45]

Yet it is clear that there was a higher virtue in such confirmations than the mere preservation of the substance of a conveyance; otherwise when once a charter had been confirmed there could be no point in procuring further confirmation of it. Nor, if a charter had been enrolled in the rolls of the King's Chancery, would there be any advantage in obtaining a subsequent Royal confirmation of it, if the sole purpose of a confirmation is to procure an entry upon the King's rolls; yet on occasion this was done.[49]

As a general rule the King inspected and confirmed only the charter which recorded the conveyance to the present holder of the land in question. Sometimes, as already mentioned, a man (or religious foundation) took the opportunity of getting a simultaneous confirmation of other charters by which other lands had come to him; but it is comparatively rare to find a confirmation of any of the charters whereby his predecessors in title had acquired the property. The normal confirmation ratifies only the final link in a tenant's title, and it is not concerned with any earlier documents. Moreover, a somewhat laborious attempt to ascertain whether the King was accustomed to inspect and confirm the charters of persons other than his tenants in chief suggests that this privilege was rarely extended to them—unless indeed the charter evidenced a conveyance of land to some religious body, or concerned escheated lands which the King had granted to his subjects, or lands conveyed to or by his consort or his Jews. Unfortunately the records of the charters so inspected rarely state from whom the grantor held the land, though the services to be rendered are often specified with considerable care.

It is clear, however, that persons other than the King's tenants

[48] But apparently the confirmation was not registered automatically—unless the person concerned took steps to see that this was done (by paying necessary fees, etc.)—Maxwell-Lyte, *The Great Seal*, pp. 363–366.

[49] *e.g.*, C.Ch.R.II, 403—charter of John de Nevile, enrolled 7 Ed. I, inspected and confirmed 19 Ed. I. He died the year after enrolment—eleven years before the confirmation—C.Fine Rolls I, 130.

in chief could upon occasion obtain his ratification of their conveyances, and that the confirmation might cover a long string of title-deeds relating to a single piece of land. A striking example of this appears in the Charter Rolls of 1257.[50] Here we have a single inspection and confirmation which embraces nine charters and a fine, which together trace the ownership of certain lands and rents. There are four successive conveyances by subinfeudation, together with five confirmations by various mesne lords. The final charter—a conveyance by Hugh de Mortuo Mari to his nephew—is followed by a fine *sur done grant et render*, whereby the latter regrants the properties to Hugh for life, with remainder to the nephew and the heirs of his body, and a final remainder to the heirs of Hugh. This fine was levied a year before the Royal confirmation occurred. And the result achieved by Hugh and his nephew would appear to have exhausted all the available methods of obtaining the support of the King, his court, and his rolls for the creation of a really invincible settlement. In fact it would seem that they obtained the then equivalent of a modern registered title, plus the additional advantage of the preclusive bar which a fine raised against third parties—if indeed any person would dare to raise adverse claims against a title which the King had ratified.

The celebrated " first known fine (1175) " printed in Round's *Feudal England* [51] from the Cartulary of Evesham provides a somewhat similar example from the previous century. Litigation had arisen in the King's Court at Evesham between A and B before the King's Justices concerning land held by A as tenant of the Abbot of Evesham. This action ended with a final concord whereby A quitclaimed all his rights in the land to B. Thereupon A restored the land to the Abbot in the King's Court, and the Abbot restored it forthwith to B. Then followed the King's charter confirming the transaction in B's favour.

Another type of transaction which appears fairly often among the charters inspected and confirmed by the King is a kind of agreement or compromise concerning land. In many cases these agreements take the form of a demise of manors to farm for a fixed term at a yearly rent, the whole of which is usually paid in advance. As a rule they appear to be a variety of mortgage or vifgage, with the alleged rent as repayment of the loan [52]; and frequently they contain complicated covenants concerning the maintenance of the

[50] C.Ch.R.I, 457–458. There is another (*ibid.*, 75, 104–105) of documents tracing a Bishop's title to the town of Axbridge, and another—*ibid.*, 51 (4) concerning Richard de Mida's settlement.

[51] (ed. 1895), pp. 509–518.

[52] *e.g.*, C.Ch.R.I, 62, 105 (s.c.), 76, 97, 121–124; II, 89–91, 116, 118, 121, 126, 189. See also C.Ch.R.II, 61, for a similar transaction where the gage included the custody and marriage of the gagor's infant son.

premises and similar matters. Sometimes, however, they operate by way of security in favour of someone who has become surety for the landowner's debts, in which case they provide that the estate of the surety is not to mature unless and until he incurs liability upon the debts in question through the landowner's default in payment.[53]

Here again it is often evident that the parties expected something more active to result from the Royal confirmation than mere Royal approval and the registration of the transaction in the charter rolls. In fact it would seem that they are anxious to obtain the King's assistance to bring pressure on any party who fails to observe the terms of the bargain. But it is clear that the sanctions of the Church are almost as valuable as those of the kingly power, for, even when such charters expressly subject the parties thereto to distraint by the King and his ministers,[54] there is often an additional clause by which they submit to ecclesiastical censure in case they commit a breach of their respective undertakings.[55] Moreover, even when the charter does not expressly invoke the King's support, the clause of ecclesiastical censure is often included,[56] or the parties bind themselves by solemn oaths,[57] or insert a fearful clause of imprecation against all who may infringe or disturb the agreement,[58] and renounce all exceptions, appeals, and the like.[59]

These agreements were inspected and confirmed by the King even if they had been made in his court before Justiciar and Justices,[60] or before the King himself.[61] And the power of the Church can be seen at times when even the King subjects himself and his heirs to papal excommunication to enforce the observance of his undertakings,[62] or makes them in the presence of the papal legate.[63] The charter of a subject, moreover, may gain in power, it seems, if made in the joint presence of legate and King.[64] In one noteworthy case the Archbishop of Canterbury and the lord of Arundel submitted a hunting dispute to arbitration, and whereas the layman alone submitted himself and his heirs to excommunication in case of breach, both parties took oath to abide the award and agreed to procure confirmations thereof by Pope and King.[65]

[53] *e.g.*, C.Ch.R.I, 68–69; II, 190–191.
[54] *e.g.*, C.Ch.R.I, 192; II, 165, 190–191, 401.
[55] *e.g.*, C.Ch.R.II, 118, 121, 122, 138–139, 187–188.
[56] *e.g.*, C.Ch.R.I, 62, 196–197.
[57] *e.g.*, C.Ch.R.I, 53, 68–69, 189; II, 90, 91, 475.
[58] *e.g.*, C.Ch.R.II, 250–251, 297–298.
[59] *e.g.*, C.Ch.R.I, 62–63, 189; II, 138–139.
[60] *e.g.*, C.Ch.R.I, 68–69.
[61] *Ibid.*, 192.
[62] *Ibid.* 164–165 (1232). Here the King also compelled the Justiciar to swear to do all in his power to preserve the charters should the King attempt to invalidate them.
[63] *Ibid.* 268.
[64] *Ibid.* 243.
[65] C.Ch.R.II, 187–188.

The inference appears to be that if the Pope or the King confirmed a charter he or his courts would support it. It may well be, therefore, that such confirmations were considered to give jurisdiction to ecclesiastical or Royal courts, even if the charter concerned some topic (*e.g.*, *privatae conventiones*[66]) which was normally outside their jurisdiction.

Another hint that the confirmation of a charter was something more than a convenient method of securing its registration is provided by the fact that simple enrolments, though possible, were extremely rare. The great majority of the charters made by the King's subjects which found their way into the charter rolls are there in consequence of the Royal confirmations which they received; and their contents are recited only because they form a necessary part of the confirmations which concern them. When bare enrolments occur they are usually of grants or quitclaims to the Crown.[67] There are, however, a very few simple enrolments in the Charter Rolls of charters made between private individuals; but apparently less than a dozen occurred in the period 1226–1300.[68] They include the foundation charter of Merton College, Oxford (1264); a conveyance which the King had sealed and was empowered to enforce by distraint (1233); and three consecutive entries of conveyances each of which relates to very small plots of land and is expressed to have been " enrolled by the consent of the parties " (1257).

3. The King as an Intermediary in Private Conveyances

Another very striking type of entry is to be seen in the Charter Rolls of the thirteenth century, namely, those which show landowners surrendering or quitclaiming lands to the King in order that he will convey the same to their nominees, or restore the land to the grantor with such limitations and remainders as the grantor desires —often approximating closely to the modern family settlement. These entries were by no means rare, and were fairly numerous in the latter half of the thirteenth century. Nevertheless, their existence during this period appears to have been overlooked by learned writers on legal history.[69]

[66] See Glanvil, X.8 and 18; Bracton, f.34, 100; Pollock & Maitland, II, 191–201.
[67] *e.g.*, C.Ch.R.I, 237, 262, 263, 335; II, 50, 207, 218, 225, 254.
[68] C.Ch.R.I, 187, 478 (3); II, 49. The appendix to C.Ch.R.VI gives three more at page 304, dated 1288: two acknowledgments of debts owed to " King's merchants," and one to the King's clerk; each empowers the creditor to levy the money from the debtor's lands and goods in default of payment.
[69] *e.g.*, Holdsworth, H.E.L. III, p. 225, states that this method of conveyancing was to be seen " only . . . in the century following the conquest "—citing two examples from the reign of Henry II in which the king granted lands which had been surrendered to him for that purpose.

This method could be used equally well for a simple conveyance or a conveyance by way of exchange; and in the latter case each party surrendered his land to the King for the behoof of the other.[70] But although such conveyances culminated in a grant from the King to the nominee of the former tenant, the original grantor occasionally bound himself and his heirs to warrant the grantee's title.[71]

It is a curious fact, that whereas the charter rolls of the early years of the reign of Henry III rarely give direct evidence that this method of conveyancing was used, those of the second half of the thirteenth century frankly admit the object of the surrender to the King, both when the surrender occurs and when it is followed by the King's re-grant. There are, however, many entries in the earlier period wherein the King is expressed to grant land to X " of the gift of " Y, and it seems likely that these may conceal surrenders and re-grants of the type with which we are dealing. Indeed this method was used in the twelfth century, the surrender being made either to the King [72] or to a mesne lord [73] to the end that the grantor's nominee may acquire his holding. It is therefore probable that these entries of the early thirteenth century refer to the same system.

The earliest entries which I have discovered in the charter rolls of the thirteenth century admittedly using this system occur in 1251.[74] But one dated 1249 states that the King is granting to A lands which were restored to the King by B,[75] and other entries which precede this make it fairly obvious that in fact it involved an exchange of lands between A and B.[76] Moreover there is an entry on the Fine Rolls of 1227 concerning a conveyance *coram nobis* by which Galfridus de Flemeng *demisit se* of his fee and *reddidit* the same to his daughter and her husband [77]; and another of the same year in the Charter Rolls contains the King's grant to A of lands which he has of the gift of B, who " demised them in the King's Court and placed him in full seisin of them " [78]: both, it would seem, concern lands held in chief of the King.

From 1251 to the end of the century, however, the entries on the Charter Rolls show with perfect clearness the machinery which this

[70] C.Ch.R.II, 198 (2).
[71] C.Fine R.I 66 (2)—exchange by Thomas de Clare and Robert de Muscegros—see also C.Ch.R.II, 198.
[72] See note 69 (*supra*).
[73] See, *ante*, note 51, concerning the fine of 1175, when A conveyed to B by restoring the land to his lord the Abbot of Evesham in order that the Abbot grant it to B.
[74] C.Ch.R.I, 369; see also *ibid.* 469, 470 (1257). In each case the surrender occurred in the King's presence, or in his court.
[75] *Ibid.* 341.
[76] *Ibid.* 39, 171, 296, 330.
[77] *Excerpta e Rotulis Finium* I, 158–159.
[78] C.Ch.R.I, 30.

type of conveyancing involved, and by collating the entries to be found in the Close, Patent and Fine Rolls we are sometimes afforded a view of all the steps by which such transactions were accomplished. First, the grantor quitclaims, restores or surrenders the lands concerned to the King. Then come the King's orders to his officers to take these lands into his hand. Next follows the King's grant to him for whose use or behoof the surrender was made. And finally we have the Royal command to the King's officers to deliver the lands to the grantee, together perhaps with the rents and profits which they have collected therefrom—though it was customary to retain at least a portion of these (*e.g.*, 20s.) for the King's use to cover his expenses in the matter.[79]

The uses of this method of conveyancing were many. It could be used to change the nature of a man's estate: thus it could effectively convert a life estate into a conditional fee or fee simple [80]; and a bishop who had acquired land for himself and his heirs was able to surrender it and obtain a re-grant to himself and his successors.[81] As already described it was utilised for exchanges of lands.[82] It was available also for unilateral conveyances.[83] It might be used if a tenant in chief desired that his own tenant should hold in chief in his stead.[84] Or it may involve two surrenders, as where land is surrendered to the Queen by her tenant to the end that she may restore it to the King, who in turn will grant it to the tenant's nominee.[85] But perhaps its most valuable phase was its application for creating marriage settlements of land.[86]

To those accustomed to the delay which modern conveyances may involve, it would seem likely that such complicated transactions as these of the thirteenth century, involving as they did the King's majesty and his government officials, were impracticably tedious in their procedure. Nevertheless it appears that the process could be completed within some nine weeks—from the time when the lands are surrendered to the King to the time when the order is issued for their delivery to the grantee.[87]

79 *e.g.*, C.Close R. (1297), 35; C.Ch.R.II, 455–456.
80 C.Ch.R.II, 254, 465—presumably this was possible only if the life tenant held direct from the King.
81 *Ibid.* 340—this included both lands held in chief of the King and lands held of mesne lords.
82 *Ibid.* 149–150, 198 (*bis*), 210.
83 *e.g.*, C.Ch.R.I, 341, 469–470, 470; II, 2, 42, 50, 84, 204, 212–213, 214, 246(?); VI, 287.
84 C.Ch.R.II, 254.
85 *Ibid.* 188; and C.Close R. (1274), 224 (s.c.).
86 *e.g.*, C.Ch.R.II, 192, 246, 263, 344–345, 346, 350–351, 423, 427, 455–456, 464, 468, 469; *Excerpta e Rotulis Finium*, I, 158–159.
87 *e.g.*, Henry de Lacy's settlement:—C.Ch.R.II, 455–456; C.Fine R.I, 343–344, 348—August 25th to October 28th. Thomas de Clare's exchange:—C.Ch.R.II, 198; C.Fine R.I, 66—March 2nd to May 13th.

It is difficult to ascertain from the entries on the rolls to what extent this method of conveyancing was available to persons other than the King's tenants in chief. Although at times the Royal grant specifies that the grantee is to hold the lands immediately from the King, it is more usual to find some non-committal phrase referring to the chief lords of the fee—a phrase which is wide enough to cover both kinds of tenancy. A somewhat extensive search among other entries concerning the parties and tenements comprised in these conveyances suggests that most of the landowners who used this system either held their lands in chief of the Crown or had acquired them from among the King's escheats or from his Jews.

There are several cases, however, which show clearly that there was no hard-and-fast restriction of this sort. Two of them concern lands granted to Edward I and re-granted by him to the Friars Preachers of London and Fisherton respectively.[88] In the former the Royal grant states that they are to hold " of the King saving to the other chief lords the services due therefrom "; while, as regards the latter, it is apparent from a subsequent entry that the donor held the premises of Sir Henry, son of Aucher, who eventually quitclaimed his rent therefrom to the Queen, who thereupon granted it to the Friars.[89] In another case, although the entry on the Charter Rolls merely states that the grantees are to hold " from the chief lords of the fee by the services due therefrom," the entry on the Close Rolls instructing the appropriate sheriffs to deliver the lands to them states that they are to hold " of the King and the other chief lords of the fee." [90] Several others contain clauses to the same effect.[91]

This method of conveyancing, interposing a grant to the King, was therefore permissible whether the grantor held directly from the King or not. Why, then, did not the King's grant state clearly from whom the lands were held? We can sympathise with the draftsman of these charters in his preference for an ambiguous phrase when we read of the commotion which resulted on one occasion from the use of the bolder words " to hold from the King by the services due." This was the marriage settlement *par excellence*, for the settlor, Gilbert de Clare, Earl of Gloucester and Hertford, had taken to wife Joan, the King's daughter; and so many and widespread were his lands and castles that five separate surrenders and re-grants were used to embody them all.[92] Presumably the unwary clerk who drafted these charters assumed that so

[88] C.Ch.R.II, 246, 249.
[89] *Ibid.* 345.
[90] C.Ch.R.II, 468; C.Close R. (1297), 35 (s.c.).
[91] *e.g.*, C.Ch.R.II, 1 (conveyance); 340 (re-grant); 346 (Simon de Monte Acuto's settlement).
[92] C.Ch.R.II, 350–351; C.Close R. (1290), 138; C.Pat.R. (1290), 359–361.

great a personage held all his lands direct from the Crown. Yet among them was the castle and honour of Tonbridge, and this he held of the Archbishop of Canterbury and his successors.[93] In order to appease the Archbishop, when the error was discovered, another Royal charter had to be made to preserve his rights and those of his church and successors. It is enrolled both on the Charter Rolls and on the Patent Rolls [94]; and, although dated ostensibly as though issued contemporaneously with the re-grants to the earl, its position at the very end of the current year suggests that it was hurriedly inserted there at least six months later, and that it was in fact ante-dated in order to atone for the original error.[95]

Presumably this method of conveyancing was more expensive than a simple feoffment by the grantor direct to the grantee. But it secured an immense number of official records of the transfer, spread among Charter, Fine, Patent and Close Rolls. The grantor's quitclaim to the King, the King's charter to the grantee and the instructions to his sheriffs to take or give seisin may all appear on one roll or another; and usually each entry carefully states in some detail the nature and purpose of the conveyance to which it relates. So here we have a mode of conveyancing which may involve registration in several or all of the King's rolls, and which therefore carries a far stronger guarantee against possible loss or destruction of the grantee's evidence of title than a simple charter of feoffment could give—even if the latter has been inspected and confirmed by the King, and has thereby gained a place on the charter rolls.

The Calendars of Charter Rolls translated and printed by the Record Office record in a number of these surrenders and re-grants that the surrender occurred " in the presence of the King." [96] In 1227 the phrase used by the *Excerpta e Rotulis Finium* is, however, *coram nobis* [97]; and on one occasion in later years the Charter Rolls describe a similar surrender as having been made in the King's Court before his Justices of the Bench, and add " as appears by a fine thereof then levied." [98] Indeed there are a number of hints in the Charter Rolls that these surrenders were often made by fine in court. Thus the King's grant may recite that he claimed the lands in his court from X who thereupon restored them to the King to be conveyed to X for life with remainders over [99]; or that the King " demanded and claimed " the property from Gilbert de Clare

93 See C.Ch.R.I, 202.
94 C.Ch.R.II, 375; C.Pat.R. (1290), 361.
95 See Maxwell-Lyte, *The Great Seal*, pp. 253–258, for later examples of ante-dated instruments under the Great Seal (1295 onwards). See also *post*, pp. 220–221, for another case of ante-dating—C.Ch.R.III, 49, 58–59.
96 *e.g.*, C.Ch.R.I, 469, 470; II, 42, 44–45, 50, 149–150, 181, 198 (2), 200, 210.
97 Vol I, 158–159.
98 C.Ch.R.II, 468 (1297); C.Pat.R. (1301), 573 (s.c.); *cf.* also C.Ch.R.I, 84 (1228), and II, 254 (1281).
99 C.Ch.R.II, 1.

(his son-in-law) who, " being unwilling to plead with the King," restored it to him—then follows the King's re-grant to Gilbert and his wife for their lives.[1]

Some grants recite that the King had recovered the lands from the grantee before the Justices in Eyre [2]; or even that the King's action had failed by judgment of the court after an inquisition had given a verdict in favour of the grantee's ancestor, who has since died.[3] Another case which is given in the Charter Rolls as a simple surrender of lands by Hugh de K. (a tenant in chief) for the behoof of the Bishop of St. David's, followed by the King's grant to the Bishop, is shown by the Patent Rolls of the same year to have necessitated Hugh's presence in person at the court of St. Briavels to make the surrender.[4] Moreover a surrender which is described in the Charter Rolls as being made by fine and acknowledgment before the justices of the King's Court at Westminster, is given in the Patent Rolls as a mere grant to the King before the justices in that court, and in the Close Rolls as a simple surrender to the King.[5]

This evidence tempts one to suspect that many, if not all, of the alleged surrenders to the King for the purpose of obtaining a Royal grant or settlement were made in his court, and that they were frequently effected by a fine levied in the King's favour before his justices—an executory fine of the type *sur concessit* or *sur cognizance de droit tantum*. Indeed it seems possible that the method of surrender by fine was considered to be particularly appropriate where the transaction included lands not held in chief of the King; for the two charters which show most clearly that a fine was used are among the comparatively rare cases (mentioned above), in which the grantee is expressly directed to hold " of the King and the other chief lords of the fee." [6] If an executory fine was in fact a usual part of the machinery in these surrenders, we can the better understand why it was so important to record that they were actually completed by the necessary transmutation of possession: hence the careful record that the lands surrendered have been actually taken into the King's hands by his sheriffs in the county on his behalf. The enrolments of the necessary orders to the sheriffs are strictly inappropriate to the Charter Rolls; nevertheless these rolls often contain at the end of the Royal grant a memorandum concerning them, or a cross-reference to the other rolls in which they are to be found.[7] And occasionally the Royal grant,

[1] *Ibid.* 372: the advowson of the bishopric of Llandaff.
[2] *Ibid.* 356, 433; III, 181.
[3] *Ibid.* II, 160.
[4] C.Ch.R.II, 204; C.Pat.R. (1277), 199 (s.c.).
[5] C.Ch.R.II, 468; C.Cl.R. (1297) 35; C.Pat.R. (1301) 573 (s.c.?).
[6] C.Ch.R.II, pp. 1, 468 (here the phrase appears in C.Cl.R. 1297, 35).
[7] *e.g.*, C.Ch.R.II, 351, 455–456.

besides reciting the original surrender of the lands to the King, adds that they were held by him " for some time by that surrender." [8] It would seem evident, therefore, that the taking of possession by the King was considered an important factor in the transaction. And it may well be that the rapid growth of conveyancing by way of levying a fine in the King's Court, if not the origin of the system, owes something to Royal encouragement, for it provided a method of granting lands to the King (whether or not for the purpose of obtaining a reconveyance from him) before him or his justices in his court, no matter where the land was situate; leaving the irksome though essential formality of accepting seisin to his local officials at some later date.

The presence of so large a proportion of conveyances of this type among the limited number of private charters which found a place in the Charter Rolls of the latter half of the thirteenth century compels the conclusion that some coveted privilege or advantage was obtained by using this roundabout type of grant. That it was peculiarly helpful for the creation of marriage settlements there can be no doubt, for it enabled a would-be settlor to evade the principle that a man cannot enfeoff himself. But clearly it must have carried greater advantages than this: otherwise one is at a loss to understand why it was involved in simple gifts, sales, or exchanges of land, in preference to a feoffment. Moreover its popularity can hardly be based simply upon the fact that it secured for a conveyance the privilege of registration upon the King's rolls; for this result was obtainable by what must have been a much simpler and less costly process—an inspection and confirmation of the charter of feoffment by the King. If the procedure involved a fine in the King's favour, presumably this fine carried with it that security against adverse claimants which normally formed its chief attraction. But even when no fine occurred it must be remembered that the transaction culminated in a delivery of the lands by the King's officers on his behalf. The grantee obtained seisin from the King. Herein, perhaps, the peculiar virtue of the transaction was thought to lie; for here we have something very like that " seisin under the King's ban " which barred third parties who failed to assert their claims against the land within a year and a day.[9]

[8] C.Ch.R.II, 464: surrender of seven manors by N. M. followed by re-grant to him and his wife in tail with remainder to him in fee simple. *Semble*, some at least of these manors were not held of the King in chief, but the settlor had recently been in the King's wardship—C.Pat.R. (1292), 497; (1293), 33; C.Close R. (1295), 437.

[9] Pollock and Maitland, II, 101; Holdsworth, H.E.L., III, 235–236; Maitland, *Collected Papers*, II, 61–80. It is to be noted that Glanvil gave no preclusive effect to a *fine*: Bracton gave fifteen days, and by Fleta's time it was a year and a day (*ibid.* 71).

That some preclusive bar of this nature normally accompanied these transactions in which the King assisted men to make their settlements or conveyances, is suggested by a curious letter from Gilbert de Clare, Earl of Gloucester and Hertford. It was written by him a week after he had obtained the King's re-grant of his many lands by way of family settlement on the occasion of his marriage to Joan, the King's daughter. It is written in Norman French, and contains an undertaking by the earl that, although he has surrendered the lands to the King who has re-granted them to him and Joan, he will nevertheless remain answerable in the King's Court to all men who claim any form of right in the lands from the days of King Richard to the date of the surrender. Thus the transaction is not to profit him at the expense of adverse claimants. Moreover he undertakes that, should such litigation arise, he will not plead the King's grant by way of defence, nor allege that he is not answerable without Joan, with whom he was jointly enfeoffed by the King. The writing is sealed with his seal, and is witnessed by the Chancellor, two other bishops, Edmund, the King's brother, an earl, two knights, " and others." At the foot of the transcript of it in the Charter Rolls is a memorandum that the Chancellor delivered it to the Keeper of the Wardrobe to be preserved there.[10]

I have found no other mention of such undertakings in the Charter Rolls of this period; nor, as a rule, did the King's grants provide that the grantee is to be precluded from taking what advantage he can derive from the transaction. Simon de Monte Acuto's settlement, however, which occurred only a week before that of Gilbert de Clare (above), contains a proviso that the grantees shall continue to hold the lands as freely as Simon held them on the date of the surrender " and shall be answerable for them to the King and others according to the law and custom of the realm notwithstanding the present gift." [11] This clause is somewhat equivocal, for it might be taken merely as an alternative to the common form " to hold of the chief lords of the fee." Yet it may well be that it was wide enough to preserve the rights of all persons who had any claim against the lands; and, if this be so, the fact that Simon found it necessary some twelve years later to obtain a Royal grant enabling him to repay by instalments certain moneys owing to the Crown may explain why this Charter expressly reserved the King's rights against the land.[12]

There is, moreover, in the Rolls of this period another admission

[10] C.Ch.R.II, 351 (1290). If Gilbert's letter was only intended to preclude him from vouching the King to warranty it was seemingly unnecessary: Bracton, f. 382b.
[11] *Ibid.* 346.
[12] C.Fine R.I, 452.

of the over-reaching powers of a Royal grant and of the tendency towards the end of the thirteenth century to include in the grant words which curtail this power. In 1289 Godfrey Giffard, Bishop of Worcester, surrendered certain lands to the King in order to obtain a re-grant. The lands in question included (a) lands in Wasthull, Worcestershire, which he held in chief, and (b) land in Cokton, Warwickshire, which he held from a mesne lord by the gift of a certain Roger de Spineto. In both cases he held for himself and his heirs, but the King's re-grant is to him *and his successors*. The re-grant carefully distinguishes between (a) and (b): it states that he is to hold the land in Wasthull from the King in chief, and that in Cokton from the chief lords of that fee. Moreover the re-grant ends with the words " saving the right of any other "; thus, although it expressly excludes over-reaching powers, it impliedly shows that third party rights might suffer were these words omitted. The original surrender is enrolled on the Close Rolls,[13] and the King's re-grant (reciting the surrender) is recorded in the Charter Rolls.[14] In 1293, four years later, the Bishop granted these Cokton lands (with certain others in the same district) to William de Spineto in fee simple. This grant was inspected and confirmed by the King in the following year, and is enrolled as such in the Patent Rolls.[15] That third parties had cause to fear the over-reaching powers of a Royal grant is further suggested by the concluding words of the Bishop's grant to William: " and no grant of the King made at the Bishop's instance . . . to the Bishop and his successors . . . shall prejudice the said William or his heirs." Apparently these words were intended to bring William within the saving clause (" saving the rights of any other ") of the re-grant which the King had made previously to the Bishop; and were attempting at the same time to preclude the Bishop from invoking the King's assistance in a further surrender and re-grant calculated to nullify William's rights.

It is submitted, therefore, that an indirect conveyance, through the King, was regarded in the thirteenth century as capable of giving a stronger title than any direct grant could give. Precisely what over-reaching powers it had, and whether those powers were recognised by law or depended solely upon arbitrary support from the Crown, is now uncertain; and the question was equally uncertain, perhaps, in the thirteenth century.[16] Meanwhile, however,

[13] C.Cl.R. (1289), 56. A memo at the foot of the entry states that the actual charter of surrender is preserved in the chest in which the Chancery Rolls are kept at the New Temple.

[14] C.Ch.R.II, 340.

[15] C.Pat.R. (1294), 98.

[16] *e.g.*, in 1269 a private charter inspected and confirmed by the King contains a covenant for further assurance by the vendor " to make . . . any assurance,

the Fine as an over-reaching conveyance was acquiring a known and definite power, backed by the authority of the Royal Courts, and available, irrespective of Royal favour, to any man who could afford the King's writ. No doubt, therefore, it was sufficiently obvious by the end of the thirteenth century that the fine was more suitable and reliable for such purposes [17]—particularly in view of the custom which had arisen of inserting in the King's re-grant a clause to preserve third-party rights.

4. Change in the Fourteenth Century

Indeed, an examination of the Charter Rolls of the years 1300–1326 reveals a striking change. They contain practically nothing but Royal grants of franchises or of forfeited or escheated lands, together with Royal confirmations of grants to ecclesiastical and other corporate bodies. In 1303 the King inspected and confirmed a family settlement made in the previous year [18]; but apart from this the rolls contain no other *inspeximus* and confirmation of a private charter unless either the church [19] or a Royal franchise [20] is concerned.

Simultaneously the Charter Rolls show a substantial reduction in the number of indirect conveyances to which the King gave his assistance. I have found only seven cases involving this type of conveyance during the first ten years of the fourteenth century, and none in the following sixteen years. Six of these seven cases were family settlements of manors and lands, some of which were held in chief of the Crown.[21] The other was a Royal grant in fee simple to R. de H., to hold in chief of the King, and recites that the former tenant in chief (cousin of the King) had surrendered the lands to the King for this purpose.[22] The six settlements include family settlements made by Roger le Bygod, marshal of England,[23] by Humphrey de Bohun, constable of England and son-in-law of Edward I,[24] and by Isabel de Bello Monte, a widow, kinswoman of the same King.[25] This last was a sorry muddle, if the rolls are to be believed. The settlement was contained in two charters, one being concerned with lands held in chief of the King, and the other

which [the purchasers] . . . and their friends shall provide, either in the king's court or before the justices in eyre." C.Ch.R.II, 117–118.

17 Thus it was said in Parliament, in *Thomas Weyland's* case (1291) that there is no "greater or more solemn assurance, nor one through which a man may have a more secure estate, nor . . . more solemn testimony to prove [it]," than a fine levied in the King's Court: cited Holdsworth III, 240.

18 C.Ch.R.III, 34.

19 *Ibid.* 193 (2).

20 *Ibid.* 36 (2), 38, 222.

21 *Ibid.* 25–26; 33; 48; 49–50, 58–59; 106; 159.

22 *Ibid.* 109.

23 *Ibid.* 25–26 (3).

24 *Ibid.* 33, "to be held from the king and the other chief lords of the fees."

25 *Ibid.* 49–50, 58–59.

with lands held from mesne lords.[26] They were duly enrolled; but apparently it was then discovered that their contents were not what the settlor had desired; hence the charters and entries were cancelled, and replaced by new charters containing the required clauses; these new charters were then enrolled and their enrolments ante-dated to the date of the original enrolments. Later still, one of these charters was itself replaced by a charter in the original form; and this charter also was enrolled—though not ante-dated—together with a memorandum that it was " assented to by the Council."

Evidently, therefore, the indirect conveyance by surrender and re-grant was still appropriate to family settlements—whether the lands concerned were held of the King or of a mesne lord. It enabled a settlor to convey lands to himself. Herein its utility remained unimpaired. That this was now its chief advantage is suggested by the fact that the only family settlement on the Charter Rolls of this period (1300–1310), which contained no limitation in favour of the settlor, was carried out by a *direct* grant—inspected and confirmed by the King.[27] And this grant was made by the same Roger le Bygod who, when desiring to make a family settlement under which he was himself to benefit, used the indirect method of surrender and re-grant—as shown above.

But even in the sphere of settlements this type of conveyancing was already doomed. The Statute *de Finibus Levatis* (1299) had provided a far simpler method whereby even the fine *sur done grant et render* now required no change of seisin for its validity.[28] And, armed with this innovation, it soon became supreme in the field of family settlements.

During the first fourteen years of the reign of Edward III the Charter Rolls again contain no private conveyances or settlements in which the King took part. Indeed, when the origin of a settlement is given, it is described as having been made by fine in court.[29] This period, together with the last sixteen years of the reign of Edward II, thus provides an unbroken sequence of thirty years' duration which would seem to mark the virtual disappearance of conveyancing by surrender and re-grant.

Two interesting conveyances, however, in which Geoffrey le Scrop was concerned, show that, although this type of conveyancing was no longer used between private individuals, it could still be

[26] *Ibid.* 49. There was also a third charter concerning certain other lands held of mesne lords; but, unlike the other two, it stood without alteration—*ibid.* p. 50, No. 57.

[27] *Ibid.* 34.

[28] Pollock and Maitland II, 104–105; Plucknett, *Concise History of the Common Law* (5th ed.), 615*n*.

[29] C.Ch.R.IV, 462 (10), 463 (2), 300 (25).

employed with advantage in grants to ecclesiastical corporations. Geoffrey desired, in 1334, to grant lands to the abbot and convent of Stratford, in order to secure masses for the souls of his parents and for his wife and himself. Both the Statute of Mortmain and *Quia Emptores* stood in his way. But neither statute bound the Crown. Hence he accomplished his purpose by surrendering the property to the King, who thereupon granted it to the abbot and convent to hold by the divine services which Geoffrey required—subject, however, to the inclusion of prayers for the soul of the late King. The lands in question were granted by two charters: the first covered lands held in chief of the Crown [30]; the second comprised lands which Geoffrey had held of mesne lords, and which he therefore surrendered to these lords who in turn surrendered them to the King in order that Geoffrey's purpose should be accomplished.[31]

The only other transactions in the period, 1327–41, which appear at first sight to be conveyances of manors effected by surrenders and re-grants in which the King participated, prove, on further examination, to be exchanges of manors which the King desired to acquire for his own purposes, and which were therefore surrendered to him in return for other manors of equal value. The Charter Rolls show two interesting examples of this type of exchange. In the first Geoffrey le Scrop was again concerned. Evidently the King wanted one of Geoffrey's manors for the Queen, and persuaded Geoffrey to surrender it to him on undertaking to provide Geoffrey with equivalent manors in return: but Geoffrey was so difficult to satisfy that he twice rejected manors granted to him as compensation, and finally accepted a third grant only on condition that additional manors should be included.[32] The second example of such a surrender to the Crown by way of exchange shows how the manors of Kennington and Vauxhall became attached to the newly created Duchy of Cornwall in 1337: they were thus acquired by Edward III, in order that he might settle them (together with other lands) upon all future heirs apparent to the throne of England, for the maintenance of the new dignity which the Duchy had conferred upon them.[33]

Thus, the Charter Rolls did not cease to function as an engine of private conveyancing until the early years of the reign of Edward II. Thereafter, however, it would appear that a Royal charter was no longer appropriate, unless perhaps the transaction involved mortmain or subinfeudation or directly concerned the King.

[30] C.Ch.R.IV, 306 (43).
[31] *Ibid.* 309–310 (20).
[32] *Ibid.* pp. 328–329, 355–356, 378–379, 381–382, 435–436.
[33] *Ibid.* pp. 399, 426–427, 428.

THE USUAL AUTHORITY OF AN AGENT

J. A. Hornby *

The authority expressly conferred by a principal upon his agent may, and normally will, be supplemented by an implied authority, which the principal has by implication consented that the agent should have in addition to his express authority. Thus, for example, every agent has implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of his express authority in the usual way.[1] This usual authority, which the principal has impliedly consented that the agent should have, amounts to actual or real authority just as much as does the agent's express authority.

In contrast with an agent's actual authority there is an agent's apparent or ostensible authority, which is based not upon the principal's consent to his having that authority but upon the fact that the principal has " held out " the agent as having the authority in question. In many cases an agent's actual authority will coincide with his apparent authority, but in others his apparent authority will be more extensive than his actual authority. In particular where an agent would ordinarily have an implied usual authority, but the principal has restricted the agent's actual authority to something less than the usual authority, then, as regards third parties who are unaware of the restriction and to whom the agent has been held out as having the " usual " authority, the agent's apparent authority will exceed his actual authority. The judgment of Lord Ellenborough C.J. in the well-known case of *Pickering* v. *Busk* [2] affords a good illustration of this situation.

In that case Swallow, a broker engaged in the hemp trade, purchased for the plaintiff a parcel of hemp lying at a particular wharf. At the plaintiff's request the hemp was delivered to Swallow by a transfer in the wharfinger's books from the name of the seller to that of Swallow. Subsequently, Swallow, having, as broker, contracted to sell hemp to Hayward and having none to deliver under that contract, transferred the plaintiff's hemp into Hayward's name, for which Hayward paid him value. The question at issue was whether Swallow had effectually passed ownership to Hayward. It was held

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1 Halsbury, *Laws of England*, 3rd ed., Vol. I, p. 164; Bowstead, *Digest of the Law of Agency*, 12th ed., Article 37 and see also Articles 38–40.

2 (1812) 15 East 38.

that the plaintiff was bound by Swallow's sale. A hemp broker ordinarily has power in the ordinary course of his business to sell hemp entrusted to him. Thus, on the assumption that the plaintiff had not given actual authority to Swallow to sell his hemp, Swallow had an apparent authority to do so, because Hayward was not aware of any limitation on Swallow's " usual " authority as a hemp broker.[3] Lord Ellenborough justified the decision in these words [4]:

> " I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. . . . Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe."

It is thus seen that the concept of an agent's usual authority is important in ascertaining the extent not merely of the agent's actual authority, but also of the authority which his principal has held him out as possessing.

It may be, however, that a principal has placed a restriction upon an agent's usual authority but nevertheless the circumstances are such that the agent's apparent authority is *not* more extensive than his actual authority. Such a situation is rare, and is perhaps confined to cases concerning undisclosed principals [5] but it occurred

[3] In such a situation nowadays, instead of resorting to common law principles of " holding out," it would be sufficient to refer to the express provisions of the Factors Act, 1889, s. 2. See also Willes J. in *Fuentes* v. *Montes* (1869) L.R. 3 C.P. 268, 277.

[4] At p. 43. The other judges, however, took the point that on the evidence the plaintiff had not expressly forbidden Swallow to sell so that he must be taken as having impliedly consented to Swallow's having authority to sell; *i.e.*, in their opinion there was actual (implied) authority; *cf. Cole* v. *North Western Bank*, L.R. 10 C.P. 354, 364–365.

[5] It will be noted that *Watteau* v. *Fenwick* was a case of an undisclosed principal. The question, whether a principal can be liable in contract for the acts of an agent exceeding the latter's actual and apparent authority but coming within the scope of his usual authority, will normally only arise in the case of an undisclosed principal, because where the existence of the principal is disclosed the agent's usual authority will normally be important in ascertaining the extent of the agent's apparent authority. In exceptional circumstances, however, the question may arise in a case where the principal's existence is disclosed. Montrose, " Liability of Principal for Acts Exceeding Actual and Apparent Authority " (1939) 17 Can.Bar Rev. 693, 710–711 suggests a hypothetical example: P appoints A as his general manager for the purchase of houses in Leeds, instructing A, however, not to disclose the existence of the agency, and not to purchase except on a surveyor's report. A discloses his position to T, withholding, however, the requirement of a surveyor's report and

in *Watteau* v. *Fenwick*.[6] In that case, one Humble had transferred his beerhouse to the defendants, a firm of brewers; after the transfer of the business, Humble remained as the defendants' manager, the licence still being taken out in Humble's name and his name remaining over the door. It was agreed between Humble and the defendants that the former should have no authority to buy any goods for the business except bottled ales and mineral waters; all other goods required were to be supplied by the defendants themselves. In contravention of this agreement Humble bought cigars from the plaintiff who, although he had given credit to Humble only (because at the time he was not aware that Humble had a principal behind him), sought to recover the price from the defendants. The cigars were such as would usually be supplied to and dealt in at such an establishment. Here Humble had no actual authority [7] to buy the cigars on the defendants' behalf, nor had he any apparent authority to do so as the defendants' agent because there was no appearance of agency at all. Nevertheless beerhouse managers such as Humble usually have authority to buy cigars for the business and the defendants were held liable.

Facts such as in *Watteau* v. *Fenwick* thus raise the question whether a principal can be personally liable on a contract made by an agent where the agent has no actual or apparent authority as an agent to make that contract but the contract in question comes within the scope of the usual authority of such an agent. This is a controversial question, which was the subject of an excellent survey in 1939 [8] by Professor Montrose. Since then, however, Professor Powell has submitted that:

> " A principal is liable for acts of an agent within his usual authority. . . . If they are within the agent's actual authority, because the principal has expressly or impliedly consented to the agent doing them, then of course the principal is liable. But, even if they are not within his actual authority, because the principal has withdrawn or restricted the usual authority, then the principal continues to be liable until third parties who

purchases houses in Leeds from T as agent for P without a surveyor's report. Here A has exceeded not merely his actual authority but also his apparent authority because P has not " held out " A to T. If P is to be liable to T it can only be on the basis of a " usual " authority as distinct from actual and apparent authority. See also Article 161 of the American Law Institute's Agency Restatement (2nd ed., 1958).

6 [1893] 1 Q.B. 346. Nowadays a person in the position of the principal in this case would have to comply with the Registration of Business Names Act, 1916.

7 Fridman, *The Law of Agency* (1960), pp. 82–83, 86–90, mistakenly classifies such cases of usual authority as *Watteau* v. *Fenwick* as cases of actual authority. The principal's express prohibition, however, clearly negatived actual authority.

8 Montrose, " Liability of Principal for Acts Exceeding Actual and Apparent Authority " (1939) Can.Bar Rev. 693.

> deal with the agent are notified or have notice of the withdrawal or restriction. It may be that the principal is also liable, in particular instances, upon the alternative ground of apparent authority. With that alternative ground we are not here concerned; whether it exists or not, the principal can still be held liable for an unauthorised act within a usual authority which has been withdrawn or restricted, until the third party is notified or has notice of these facts." [9]

More recently, writers on Company Law have followed Powell in adopting this theory of an agent's " usual " authority and have done so without regard to its controversial nature.[10] It would seem, therefore, that this is a convenient time to reconsider the question of an agent's " usual " authority.

In addition to the authorities considered by Montrose, Powell relies strongly on *Whitehead* v. *Tuckett* [11] and *Smith* v. *M'Guire*.[12] In *Whitehead* v. *Tuckett* [11] Sill and Co. were brokers, who were in the habit of buying and selling sugar, on speculation, in their own names but on behalf of Tuckett. On one occasion, having previously bought a quantity of sugar for Tuckett, they resold it at a price less than that mentioned in letters addressed to them by Tuckett. Two reasons were given for holding Tuckett bound by the sale, *viz.* (i) that, as a matter of construction, Tuckett's letters were not limitations on the agent's authority but amounted merely to suggestions and advice as to how they should exercise their discretion in selling,[13] and (ii) that, even if Tuckett had limited the agent's authority to sell, he had held them out as having an unrestricted authority.[14] The case thus affords no assistance to Powell's contention. Powell cites Lord Ellenborough C.J. as saying (at p. 408):

> " Although there was a communication between them and the defendant as to the price and the time of sale, yet the world was not privy to that communication, and had therefore no means of knowing that their general authority was controlled by the imposition of any check,"

[9] Powell, *The Law of Agency* (2nd ed.), p. 73. See also Fridman, *op. cit.*, pp. 86–90.

[10] Gower, *The Principles of Modern Company Law* (2nd ed.) pp. 146–152; Rice, " Power of a Director to Bind the Company " (1959) *Journal of Business Law* 332, 336–337. On the other hand, Thompson rejects it in his " Company Law Doctrines and Authority to Contract " (1956) 11 Univ. of Toronto L.J. 248, 251.

[11] (1812) 15 East 400.

[12] (1858) 3 H. & N. 554. He also refers to *Fenn* v. *Harrison* (1790) 3 Term Rep. 757, 760; *Beaufort* (*Duke*) v. *Neeld* (1845) 12 Cl. & Fin. 248; *Coles* v. *Bristow* (1868) 4 Ch.App. 3, 14, but these are only illustrations of " apparent " authority.

[13] See particularly Lord Ellenborough C.J. at pp. 408–410 and Le Blanc J. at p. 411.

[14] See at pp. 408, 410 and 411.

but this amounts to no more than an affirmation of the agents' apparent authority. He also cites from Le Blanc J.'s judgment (at p. 410):

> " We must hold the defendant to be bound by the general authority thus given to Sill & Co. *It is unnecessary to enter into the question whether an agent who exceeds his authority can bind his principal.*" [15]

There could not be a clearer indication than the words italicised that the case does not assist Powell.

In *Smith* v. *M'Guire* [12] the defendant denied liability on a charterparty signed by his brother Martin " *per procuration* " of the defendant. Some three years previously the defendant had left Martin to conduct his business of a corn merchant at Limerick, the defendant's name remaining over the door. During the next three years Martin chartered numerous ships on the defendant's account. The defendant proved that on these occasions he had usually sent special instructions to Martin, and that he had never authorised him to sign this particular charter. It was held that the jury had been properly directed that if the defendant had allowed Martin to act as his general agent, he was liable although Martin might have exceeded his authority. The case is clearly one of apparent authority.[16]

Thus in fact neither *Whitehead* v. *Tuckett* [11] nor *Smith* v. *M'Guire* [12] supports Powell's submission, and one has to fall back on a reconsideration of such cases as *Watteau* v. *Fenwick* [17] and *Edmunds* v. *Bushell & Jones*.[18] In *Watteau* v. *Fenwick* (the facts of which are set out above), although Humble had no actual or apparent authority to buy the cigars as agent for the defendants, the Divisional Court nevertheless held the defendants liable, and alleged that there is a principle that (apart from any considerations of holding out of authority)

> " the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that

[15] My italics.

[16] Pollock C.B. states the relevant principle thus: " Has the party who is charged with liability under the instrument or contract authorised and permitted the person, who has professed to act as his agent, to act in such a manner and to such an extent that, from what has occurred publicly, the public in general would have a right to reasonably conclude, and persons dealing with him would naturally draw the inference, that he was a general agent? If so, in my judgment, the principal is bound, although, as between him and the agent, he takes care on every occasion to give special instructions; and *I think it makes no difference whatever whether the agent acts as if he were the principal or professes to act as agent*, as by signing ' A.B., agent for C.D.' " Powell merely cites the words italicised, but these relate only to the form of signature and do not detract from the necessity of an appearance of authority (which is required by the earlier part of the passage).

[17] [1893] 1 Q.B. 346.

[18] (1865) L.R. 1 Q.B. 97.

> character, notwithstanding limitations, as between the principal and the agent, put upon that authority." [19]

Wills J. supported this alleged principle on two grounds.[20] The first was that:

> " In the case of a dormant partner it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is on such a question nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion."

In fact the learned judge was mistaken as to the law of partnership and his argument was in conflict with the Partnership Act, 1890, s. 5.[21] The second reason was that the alleged principle was identical with the principle laid down in *Edmunds* v. *Bushell and Jones*.[18] In that case Jones employed Bushell as manager of Jones' business, which was carried on under the name of " Bushell & Co." The drawing and accepting of bills of exchange was incidental to the carrying on of such a business, but it was stipulated between them that Bushell should not draw or accept bills. Nevertheless, on Bushell's accepting a bill in the name of " Bushell & Co.," it was held that Jones was liable on it to an indorsee, who took the bill knowing nothing of Bushell & Co. (*i.e.*, without any knowledge of Messrs. Bushell & Jones). The decision proceeded on the basis that just as it is possible for a person to hold out another as his agent so it is possible for him to hold out another as the owner of his business and that here Jones was liable because he had held out Bushell as the principal.[22] The principal of a business will be liable if he holds out another as the principal. *Edmunds* v. *Bushell and Jones* [23] and *Watteau* v. *Fenwick* [17] (in so far as it was decided on the same principle) are thus no authority on the situation where an agent purports to act as an agent.

[19] [1893] 1 Q.B. at pp. 348–349.
[20] At p. 349 Lord Coleridge C.J. concurred in his judgment.
[21] Powell, *op. cit.*, p. 77, admits this.
[22] Thus Cockburn C.J. (at p. 99): " Bushell was therefore the agent of the defendant Jones, and Jones was the principal, but *he held out Bushell as the principal and owner* of the business. That being so, the case falls within the well-established principle, that if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority. . . . Bushell cannot be divested of the *apparent authority* as against third persons by a secret reservation "; Mellor J. (at p. 100): " Here Jones *puts forward Bushell as a principal*. . . . It would be very dangerous to hold that a person who allows an agent to act *as a principal* in carrying on a business, and *invests him with an apparent authority*, to enter into contracts incidental to it, could limit that authority by a secret reservation "; Shee J. (at p. 100): " the natural inference when a person allows an agent to carry on a particular business *as an ostensible principal*, is that he clothes him with every authority incidental to a principal in the business." (My italics.)
[23] (1865) L.R. 1 Q.B. 97.

No reference was made in *Watteau* v. *Fenwick* [17] to the earlier Court of Appeal decision in *Daun* v. *Simmins*.[24] In that case the defendant bought a " tied " public-house and put in one Clarke as manager, the licence being taken out in the defendant's name. Although the defendant had forbidden Clarke to obtain goods on credit from persons other than two specified distillers and brewers, Clarke bought spirits on credit in the defendant's name from the plaintiffs, who were not one of the specified suppliers. The Court of Appeal held that the defendant was not liable for the price of the spirits. Clearly Clarke had no actual authority to buy from the plaintiffs and it was held that he had no apparent authority either. It was clear to the court that the manager of a public-house ordinarily only orders spirits of particular persons and has no authority to order from any dealer. Thus although Clarke was (and had been held out as) manager of the public-house, he had not been held out as having authority to order from any dealer.[25] *Watteau* v. *Fenwick* [17] and *Daun* v. *Simmins* [24] were both considered by the Divisional Court in *Kinahan & Co. Ltd.* v. *Parry*,[26] where the facts were similar to those in *Daun* v. *Simmins* [24] save that the licence was taken out in the name of the manager, whose name appeared over the door. This was held to be a material distinction and the court, following *Watteau* v. *Fenwick*,[17] held the proprietor liable on the manager's contract. The case is well summarised in Lord Coleridge's words:

> " Where a man is the licensee and is known to be the licensee, and nothing is brought to the attention of the seller to indicate to him that the position of the person with whom he is dealing is that of a mere manager of a tied house, the seller who trades with the licensee as a *principal* and afterwards discovers that he is an agent is entitled, in my opinion, to sue the real principal when disclosed, notwithstanding any limitations on the authority given to the agent by the principal." [27]

Edmunds v. *Bushell & Jones*,[18] *Watteau* v. *Fenwick* [17] and *Kinahan & Co. Ltd.* v. *Parry* [26] are all cases of apparent authority.

[24] (1879) 41 L.T. 783.

[25] The comment of Fridman, *op. cit.*, pp. 89–90, that *Daun* v. *Simmins* shows what happens where there is notice of a limitation of usual authority receives no support from the judgments. In fact *there was no usual authority* to order from any dealer and therefore no holding out of the agent as having usual authority.

Montrose, *op cit.*, pp. 709–710, states that *Daun* v. *Simmins* may be distinguished from *Watteau* v. *Fenwick* not only on the ground that the existence of the principal was disclosed but also on the ground that the agent's act was not within the usual authority of the manager of a public-house, but it would seem that the C.A. only went into the question of the manager's usual authority for the purpose of deciding the extent of his apparent authority.

[26] [1910] 2 K.B. 389. Reversed on a different view of the facts [1911] 1 K.B. 459, the C.A. holding that there was no evidence that the spirits were supplied for the use of the hotel and not to the manager personally.

[27] [1910] 2 K.B. at p. 894. (My italics.)

In all three cases the agent was held out by his principal as having the authority not of an agent, but of a principal [28]; the agent was the apparent principal and owner of the business.[29] Where a person is held out as being the principal and owner of a business, it is in accordance with well-recognised principle that the true owner and principal should be precluded from denying that the agent is owner of the assets of the business in question, but as these cases rest on apparent ownership of the business, liability should be limited to the assets of the business, and these cases cannot be justified in so far as they impose a more extensive personal liability on the true principal and owner. Further the statement of Wills J. in *Watteau* v. *Fenwick* that, in spite of the agent's having neither actual nor apparent authority as an agent,

> " the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority " [30]

is supported neither by the previous cases nor by his own reasoning. It must, therefore, be considered doubtful whether English courts would now follow Wills J.'s statement of principle.[31]

Finally, mention must be made of the usual authority of company agents. In so far as an agent has received express authority he will have the implied usual authority incidental to such authority, and in so far as he has been held out as having a particular

[28] Goodhart and Hamson, " Undisclosed Principals in Contract," 4 Camb.L.J. 310, 336–337, say that *Watteau* v. *Fenwick* is an example of pure estoppel by conduct and speak of the principal's " external notorious act " of putting Humble in charge of the beer-house. Montrose, *op. cit.*, p. 696, comments that the external notorious act was surely that the agent was in charge of the beer-house, not that he had been put in charge by the principal, and says that it is difficult on the facts to see that there was any representation at all made by the defendants.

However, in both *Watteau* v. *Fenwick* and *Kinahan & Co. Ltd.* v. *Parry* the owner had put the agent's name as a licensee over the door (or had allowed it to remain). The defendants had thus made a representation that the agent was the licensee and this seems to have been treated as a representation that he was the owner. *Quaere*, whether nowadays a representation that a person was licensee would be construed as one that he was the principal. Similarly, in *Edmunds* v. *Bushell & Jones*, putting up the name " Bushell & Co." seems to have been regarded as a representation that Bushell was a principal.

[29] *Cf.* Mechem, *Outlines of the Law of Agency* (4th ed. 1952) pp. 114–116. See also Article 195 of the American Law Institute's Agency Restatement.

[30] [1893] 1 Q.B. 346.

[31] In *Jerome* v. *Bentley & Co.* [1952] 2 All E.R. 114, Donovan, J. did not have to consider its validity, for he distinguished *Watteau* v. *Fenwick*.

On the other hand, the American Law Institute's Agency Restatement (Articles 161, 194 and 195) makes the principal liable for acts exceeding the agent's actual and apparent authority, if there is a usual authority. A notable American supporter of the concept of liability based on usual authority independently of actual and apparent authority is Prof. W. A. Seavey. See particularly his article, " Agency Powers " (1948), Oklahoma L.Rev. 3 and his notes to Article 161 of the Agency Restatement (2nd ed. 1958).

authority he will also have been held out as having the usual authority incidental to such authority, and this will be so whether his principal is a natural person or a company. The question may be asked whether managing directors *as a class* have a " usual " authority, but it may be doubted whether the office of a managing director has *per se* any " usual " authority attached to it.[32]

There is a well-known passage in *Re City Equitable Fire Insurance Co.*,[33] in which Romer J. said:

> " It is indeed impossible to describe the duty of directors in general terms, whether by way of analogy or otherwise. The position of a director of a company carrying on a small retail business is very different from that of a director of a railway company. The duties of a bank director may differ widely from those of an insurance director, and the duties of a director of one insurance company may differ from those of a director of another."

Romer J. was there speaking of directors generally, but what he had to say seems equally applicable to managing directors. Companies nowadays carry on such diverse activities. Is it possible to say that managing directors, as a class, have a usual authority, which is common both to the managing director of a small tobacconist's shop, which has been " turned into a limited company," and to a managing director of one of the industrial giants, such as Imperial Chemical Industries Ltd.? Again, one imagines that in the largest companies there is a division of function amongst several managing directors, who are each allotted a specific sphere of responsibility, whereas in the smallest companies there may be just one managing director with general responsibility. Further, it is possible to be a managing director of a holding company and yet have no managerial functions in it.[34]

It is, of course, possible for a particular managing director to have " usual " authority, but it is submitted that his " usual " authority has to be ascertained in the light of all the circumstances,

[32] Gower, *op. cit.*, pp. 146–152, and Rice, *op. cit.*, pp. 336–339, seem to infer that managing directors have such an authority. Gower cites Sargant L.J., who said in *Houghton & Co.* v. *Nothard, Lowe & Wills* [1927] 1 K.B. 246, 267: " the act done was one within the ordinary ambit of the powers of a managing director in the transaction of the company's affairs "; but it should be noted that Sargant L.J. spoke of " *the* company's affairs," not of " *a* company's affairs." A similar comment may be made on Rice's citation of Atkin L.J. in *Kreditbank Cassel* v. *Schenkers* [1927] 1 K.B. 826, 844: " If you are dealing with a director in a matter in which normally a director would have power to act for *the* company you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power."

[33] [1925] 1 Ch. 407, 426.

[34] As in *Harold Holdsworth & Co. (Wakefield) Ltd.* v. *Caddies* [1955] 1 W.L.R. 352, where a managing director of a holding company was directed to confine his attentions to a subsidiary company.

including the nature of the company's business, the company's size and past history, and the terms of the particular managing director's appointment, and that the mere fact that a person is a managing director does not mean that he has a " usual " authority which is common to all other managing directors of all other companies.

Summary

1. The concept of an agent's " usual " authority is important in ascertaining the extent of the agent's actual and apparent authority.

2. The contention that in English law a principal can be liable in contract for the acts of an agent exceeding the latter's actual and apparent authority as agent depends on a statement of principle by Wills J. in *Watteau* v. *Fenwick*. This statement is supported neither by the previous cases nor by Wills J.'s reasoning.

3. *Edmunds* v. *Bushell & Jones*, *Watteau* v. *Fenwick* and *Kinahan & Co. Ltd.* v. *Parry* are all cases in which the agent was held out by the principal as having the authority of a principal and owner of a business; as these cases rest on apparent ownership the principal should be merely precluded from denying that the agent is owner of the assets of the business, and these cases cannot be justified in so far as they impose a more extensive personal liability on the true principal and owner.

4. Although a particular managing director of a company may have a " usual " authority, he does not have a " usual " authority which is common to all other managing directors of all other companies.[35]

[35] Stoljar in his *Law of Agency* (1961), which was published too late to be considered in the text, approves *Watteau* v. *Fenwick*, but his arguments seem no more persuasive than those of Powell. *Petty* v. *Anderson* (1825) 3 Bing. 170, *Davison* v. *Donaldson* (1882) 9 Q.B.D. 623 and *Robinson* v. *Read* (1829) 9 B. & C. 449 (all cited by Stoljar) are cases of actual authority.

BOOK REVIEWS

Juvenile Justice. By Ola Nyquist, ll.d., Assistant Professor of Criminal Policy, University of Uppsala. Vol. XII of Cambridge Studies in Criminology. [London: Macmillan & Co., Ltd.; N.Y.: St. Martin's Press. 1960. xxii, 243 and (appendices etc.) 58 pp. 50s. net.]

This is a stimulating and important book, but it is not easy reading. In the first place the author, a Swede, is writing in what to him is a foreign language, no mean feat in itself. But although this makes him sometimes a little difficult to follow the result is well worth the effort. In fact the occasional unfamiliar use of words can be an advantage in that it obliges the reader to stop and think, and to reconsider his own terms. A good example of this is the clear distinction drawn by Dr. Nyquist between what he calls public and individual crime prevention.

Then again Dr. Nyquist has assembled a vast amount of factual information about the very varied ways in which countries in all parts of the western world are trying to solve their problems of juvenile delinquency. He is not content however simply to record information but is at pains to assess its meaning. For this purpose he gives us to begin with a detailed description and comparison of the Swedish Welfare Board system on the one hand and the Californian Juvenile Court and Youth Authority on the other, that is, a comparison between a largely administrative and a predominantly judicial solution of the problem.

Having compared these two contrasting methods Dr. Nyquist asks in Chapter IV whether their function is the same or different, whether "a juvenile court system has the same ultimate aim as a child welfare board system when dealing with juvenile offenders"? He concludes that the aim is the same, *i.e.*, "the satisfactory adaptation of the juvenile offender to society"; and that the existing differences lie largely in the nature of the means used to achieve this end; the court system tending to stress the immediate protection of society before the reformation and ultimate welfare of the individual, and therefore to use more deterrent or negative measures; the welfare board giving more weight to the positive welfare and consequent reform of the individual, but insisting that the long-term protection of society will also be served thereby. In practice however, as Dr. Nyquist points out, these positive and negative measures are bound to overlap, "the California juvenile court uses special disciplinary measures for the purpose of reformation and the Swedish welfare schools cannot entirely disregard the demands of safety and public crime prevention."

Chapter V begins with an interesting review of the historical background to the concept of criminal responsibility, and of the gradual development of special procedures for young offenders and the consequent growth of the idea of a minimum age limit for such responsibility. It goes on to discuss why a largely welfare and administrative solution of the problems involved should have been developed in Scandinavia, while the rest of the western world has preferred a judicial solution based on a modified though still basically criminal procedure. For the English reader this section is particularly valuable, for it shows how varied are the existing ways of dealing with the problems of delinquency and of the gradual development of legal and moral responsibility in children and young people, in many different parts of the world. The author suggests that there is no perfect solution, and that all methods have their advantages and disadvantages. To those steeped in the arguments in favour of the essential superiority of the English system of justice and the procedures derived from it, this is a salutary notion.

Chapter VI consists of an examination of the need for differentiation between juvenile and adult offenders, both as to the procedures for dealing with them and as to the treatment to be provided. The conclusion is reached that the necessary differences are not as great as they have sometimes been assumed to be, and that they are differences of emphasis and degree rather than of kind. There follows a detailed discussion of the nature and development of responsibility in the young, and of the need for a " penal minimum age limit." The author seems to question the appropriateness of the classical concept of criminal responsibility in dealing with the immature young person, and the interesting possibility is raised of creating a unified (monistic) system of juvenile justice. It would " embody all institutional and most of the non-institutional measures (including probation) " and could be " established within the socialised and individualised scope of modern criminal justice." It would entail " a lowering of the penal minimum age or no such limit at all." Dr. Nyquist seems to see such a unified system as including the protective and preventive functions of a welfare board, and the care and protection jurisdiction of the English juvenile court, and he is obviously attracted by a judicial solution on the ground that it provides " legal security " for the individuals concerned. It is not so clear why he feels that the judicial element should necessarily be based on a criminal procedure implying criminal responsibility on the part of the child. Legal security could be equally well safeguarded by a procedure firmly based on the needs of the individual and of the community. In this connection it is interesting to compare the new single procedure for certain children and young persons suggested in the report of the Ingleby Committee.

In his last chapter Dr. Nyquist considers the question of what ought to be the nature of the " competent organisation " for dealing

with juvenile delinquency and allied problems. He has grasped the inevitable dilemma with which any such body will have to contend —that the interests of the individual and of society do at times clash, and cannot always be entirely reconciled even in the long run. He sees very clearly the advantages of the positive approach of the welfare board system, but recognises that it lacks two things: the power to order what he calls " pedagogic measures " and an adequate machinery for protecting the rights and liberties of the individuals concerned, both parents and child. He seems to feel that it is impossible to distinguish between welfare or reformative, and punitive, measures, and that either may be required for both the individual and the public prevention of delinquency, that is, for the welfare of the individual or for that of the community. He recognises that both punitive and welfare measures may require deprivation of liberty or of other rights of the individual, and that a sense of legal security or justice is essential for the success of any measure whether punitive or welfare. Taking all this into consideration his final conclusion would appear to be that the most appropriate body to deal with the problem and to exercise the necessary powers is likely to be a juvenile court within the legal framework of the particular country.

HESTER A. ADRIAN.

The Detection of Secret Homicide. By J. D. J. HAVARD, M.A., LL.B., M.B., B.CHIR., of the Middle Temple, Barrister-at-Law. Vol. XI of Cambridge Studies in Criminology. [London: Macmillan & Co., Ltd. 1960. xv, 221 and (tables, bibliography, index) 32 pp. 35s. net.]

FEW punches are pulled in this scholarly and important book which exposes in no uncertain manner, not by any means for the first time, the many major and minor defects in our traditional system of investigating sudden and unexplained deaths. After subjecting the reader, in chapter after chapter, to a steady and mounting indictment of different facets of the procedure by coroner's inquest it is all the more surprising to read, towards the conclusion of the book (p. 208), the author's opinion that our existing medico-legal investigative system " is basically superior to any other in existence in the world today." Preoccupation with the various shortcomings of individual part-time coroners, Dr. Havard maintains, has led critics of the coroner system to overlook the fact that " it is not the system but the establishment which is at fault." The author never really quite succeeds in explaining this somewhat subtle distinction which, nevertheless, enables him to sustain his whole-hearted support for the retention of the office of coroner, and to reject, for not altogether convincing reasons, the North American solution of professionally qualified medical examiners. The latter, according to Dr. Havard, suffer from lack of independence in the discharge of

their responsibilities, which he regards as the hall-mark of the English coroner. Whether this one single feature justifies the author's rather exaggerated estimate of the intrinsic merits of the coroner system is, I suggest, somewhat debatable.

In outlining the reforms which have been advocated by successive Governmental Committees during the past century, and now invigorated by Dr. Havard's own brand of invective, multiplicity of illustrations and persuasive reasoning, it soon becomes apparent that the author of this work is anxious to sweep away the present army of some 600 part-time coroners, assistant and deputy coroners who almost submerge the sprinkling of full-time appointees, and to establish in their place a highly-trained corps of full-time chief coroners, supported by two or more assistants and each exercising sufficient territorial jurisdiction to support the full machinery of modern medico-legal investigation. Dismissing as nowhere near sufficient the recommendation of the 1936 Departmental Committee that coroners should be " acquainted with forensic medicine," Dr. Havard boldly asserts that the minimal requirements for a chief coroner should be " qualifications, and preferably university degrees, in both law and medicine, with post-graduate experience in both criminal courts and forensic pathology." This striking proposal owes much to the conclusions reached in 1951 by a joint committee of professional bodies in the United States of America which investigated the requirements of a good medico-legal investigative system and whose work appears to have exerted considerable influence upon Dr. Havard's approach to the entire subject. Indeed, it is one of the principal merits of this book that the author has cast his net wide and provides the reader with a considered statement of the different systems prevailing in other parts of the world. In the light of his specific recommendations Dr. Havard seems not to be unduly ambitious in claiming (p. 207) that under such a Utopian system " it should be possible for the chief coroner of each area to attain a status approaching that of a county court judge, with corresponding remuneration."

Dr. Havard's valuable suggestion that the chief coroner's office in each area should be sited in close proximity to one of the Home Office forensic science laboratories and be expected to work in liaison with a medical school presupposes, as essential to overcoming the existing state of affairs, the provision of modern facilities for carrying out medico-legal autopsies. On what to me seems to be convincing evidence—some fifteen pages in all (pp. 155–169) are devoted to chronicling a series of cases, some of them quite astonishing, in which the failure to carry out an autopsy, or the performance of an inadequate autopsy, has led to the concealment of homicide—the author is emphatic in declaring that a complete and thorough medico-legal autopsy is *the* most important factor in the investigation of unexplained deaths. That so many of the author's illustrations are derived from other jurisdictions may tend, perhaps, to

weaken the force of his conclusions so far as the experience of this country is concerned. However, utterly convincing though his arguments may be in themselves, Dr. Havard is not blind to the realities of the situation and appreciates the need, if his conclusions are to reach the point of being incorporated in amending legislation, to dispel the public's deeply embedded suspicion that post-mortem examinations are crude affairs resembling " an uncontrolled orgy of butchery." To achieve the kind of objectives set out in this work the general public must be educated and become convinced that a modern post-mortem examination is, as the author describes it, " a carefully conducted surgical operation in which the body is not haphazardly mutilated." Conventional ideas die hard and a long battle lies ahead before public opinion, in Britain at any rate, is transformed. Opportunities, however, exist nowadays by means of the new media of communication which were not available even a decade or so ago, and delicate though the task must be in describing how and why autopsies are necessary, attention must be given to this educative process as one of the first, not the last, steps in achieving the widely recognised need for reorganising our medico-legal investigative system.

Another aspect of the same problem, given considerable stress by the author, is the quality of medico-legal post-mortems. " If the medical literature," writes Dr. Havard (p. 152), " abounds with illustrations of homicides passing unnoticed, or persons wrongly accused, as a result of omitting autopsy altogether, then there are just as many cases in which the same sorry result is achieved by an autopsy carried out by an inexperienced medical practitioner." The need for restricting such examinations to doctors experienced in medico-legal autopsy was emphasised by the Registrar-General as early as 1858, and has been reiterated *ad nauseam* ever since by Select and Departmental Committees, the most recent being that of the Coroners' Committee in 1936 which strongly recommended that a panel of pathologists should be set up by the Home Secretary, from which coroners could select the individual to carry out a particular medico-legal autopsy. Watered down, this appeared in the Coroners' Rules of 1953 as a recommendation that " the post-mortem examination should be made, whenever practicable, by a pathologist with suitable qualifications and experience and having access to laboratory facilities." In making the observation that even this recommendation has been disregarded in all but the most heavily populated urban areas where forensic pathologists are easily at hand, Dr. Havard is, in effect, tacitly underlining the need to establish a limited number only of coroners' jurisdictions within which the select band of trained forensic pathologists can be conserved and utilised in the most efficient manner.

Dr. Havard's other main focus of attention is the inadequacy of the prevailing law governing the notification to the coroner of sudden or unexplained deaths. How many members of the legal

profession are aware, for example, of the absence of any express duty, on the part of either medical practitioners, nurses, or undertakers, to inform the coroner where " there is reasonable cause to suspect that such person has died either a violent or an unnatural death or has died a sudden death of which the cause is unknown," the criteria laid down in the Coroners Act, 1887, for determining the coroner's jurisdiction to hold an inquest? Who is prepared to gainsay the author's emphatic assertion that the absence of such a clearly defined duty " constitutes *the* major defect in our medico-legal investigation of sudden death "? (p. 87). Attempts made from time to time to spell out and enforce a common law duty of notification have met with derision and a challenging attitude on the part of the medical profession, on the grounds that it would constitute an unwarranted burden on the doctor to have to notify the coroner, and that it might contravene the professional code of ethics. The fact that doctors in other countries find no similar objections to complying with such a duty suggests the absence of any fundamental objection inherent in the English code of medical ethics. Adopting an American writer's description of this code as " a triumph of medical altruism over legal duty " Dr. Havard adds the deservedly caustic comment that, fortunately, not every country's medical profession sacrifices the security of the community in the interests of the individual patient to the extent that it is seen in England (p. 217).

The antipathy between the medical profession and, especially, the part-time coroner who is a solicitor and unqualified in medicine may, of course, provide a great deal of the explanation for this deep-rooted objection to the creation of a statutory duty of notification, which would seem a preferable solution to the resurrection of the dubious common law misdemeanour as a means of facilitating the detection of homicide. And the author is surely justified in his further assertion that the present system of indirect notification of the coroner via the local registrar of deaths, with its delays, the obscurity of the relevant statutory provisions and the doubtful competency of local registrars in deciding when to report a death to the coroner, is apt to be singularly inefficient as a means of detecting the commission of homicide. So long, however, as this purpose is regarded as a secondary function of the death certificate procedure, statistical information being accorded the paramount position, Dr. Havard's criticism will continue to remain unanswered.

Perhaps the most dangerous feature of the present system of death certification is the absence of any enforceable duty on the certifying doctor to view the body after death, which the author describes as " deplorable " (p. 217). It certainly came as a surprise to me to read (p. 99) that more than 100,000 persons are certified dead each year without being seen after death by their doctors. Some of the consequences of such a practice are effectively illustrated from a number of well-known cases, including the notorious

Seddon trial, during the course of which strong criticism of the law, still unchanged, was expressed by Sir Rufus Isaacs, the then Attorney-General. The illogicality of the prevailing law can perhaps best be appreciated by the fact that whereas cremation is, theoretically at least, tightly governed by statutory provisions which include the requirement that the body be examined by a doctor before the confirmatory certificate for cremation is issued, there is a complete absence of any statutory regulations governing the embalming of the dead, notwithstanding the known fact that the process of embalming renders ineffectual the majority of tests for poisons (pp. 121–122).

The principal defects in the existing procedures for solving unexplained deaths and detecting cases of homicide, so clearly portrayed in this splendid work of Dr. Havard, do not seem capable of seriously being controverted. To remedy them by legislation, rather than by the slower process of evolutionary changes, might seem the fairly obvious solution, but that is not an immediate prospect. Before we even begin to think in terms of a remedial statute there is, in addition to the task already adverted to of educating the public in the matter of autopsies, the problem of remedying the wide gulf separating the two professions of law and medicine in the simple matter of understanding the other's point of view, for which state of affairs both professions must share equal blame. The establishing of goodwill between the ordinary ranks of medical and legal practitioners is an indispensable preliminary to the advancement outlined in this book. Dr. Havard's plea for a widespread extension in the teaching of medical jurisprudence in our medical schools is an old cry but one that needs to be repeated. The dangers of letting loose in the country's mortuaries, discharging the important function of medico-legal autopsies, medical practitioners untrained in the field of forensic pathology is abundantly shown in this book. To establish the kind of coroner service which the author envisages may well entail a period of training and qualifications beyond that actually required to eradicate most of the present weaknesses. To set the standards as high as he has urged may not be realisable as a practical proposition. To regard such standards, however, as an ideal towards which to advance from the present unsatisfactory position may well represent the author's true objective and it is to be hoped that some of the fervour of his approach will be absorbed and acted upon by those in a position to guide the future development of the medico-legal investigative system in this country.

J. Ll. J. Edwards.

Christopher Palles, his life and times. By V. T. H. Delany. [Dublin: Allen Figgis & Co., Ltd. 1960. 174 and (appendices and index) 26 pp. 21s. net.]

Christopher Palles: what a superb name to be endowed with:

and how memorable its holder made it! The surname, a corruption of *de palatio*, was acquired because the founder of the line was a relation of Octavian de Spinellis, the Pope's nominee to the Archbishopric of Armagh in 1477, who had held office in the papal palace. The family prospered, and gave its name to Mount Palles, a property inherited from the Nugents in the eighteenth century.

The family remained Catholic, so Christopher, who was born in 1831, went to school at Clongowes Wood College. At that time a Catholic could, without incurring ecclesiastical displeasure, join the University of Dublin, better known as Trinity College, Dublin, and Christopher did so in 1847. Studying mathematics he made the best possible use of its very strong faculty in that subject, and was placed fourth in his final examination in 1851.

He had already joined the Society of King's Inns, but a regulation, imposed by a statute of 1542, and not abrogated until 1885, made it obligatory for men called to the Irish Bar to keep terms at an English Inn of Court, so he became a member of Gray's Inn for this purpose. He was called to the Irish Bar in 1853.

In February 1872 Palles, who by then had reached the very first rank at the Irish Bar, was selected by Gladstone's Irish Secretary for appointment as Solicitor-General for Ireland. He was promoted Attorney-General in December.

At that time the parliamentary seat for Londonderry was vacant, Palles was a candidate, and was defeated. The circumstances of this election, the first held in Ireland under the Ballot Act, are vividly narrated in Chapter VIII.

In December 1873 D. R. Pigot, Chief Baron of the Irish Exchequer, died. If he had lived but two months longer Palles would not have succeeded him, for Gladstone's administration came to an end in February 1874. Even so Palles was appointed with only twelve hours to spare, Gladstone having taken no action with regard to the vacancy until the very last day of his tenure of office. Whether this was creditable the readers of Chapter IX must judge.

When Palles retired in 1916 he had held the title Chief Baron during almost exactly half of his life, and had twice refused the Lord Chancellorship of Ireland. When one remembers that the legal problems of a country are limited by the size of its population, the fact that he had achieved a reputation so far outstripping the limits of his jurisdiction is remarkable. Acknowledging his resignation Asquith wrote, with complete truth, "As an old practitioner I venture to say that the judgments of Palles C.B. are held in as high esteem by English and American as by Irish lawyers."

He was sworn of the English Privy Council in 1892: it was consequently possible for him to be summoned to sit as a member of the Judicial Committee in *Re Marriage Legislation in Canada* [1912] A.C. 880, with Lords Haldane, Halsbury, Macnaghten, Atkinson and Shaw. Mr. Delany tells us (p. 147) that after a week's silence Palles asked counsel, who had submitted a certain

proposition, " What authority have you? " " My Lord, I have the best possible authority, an opinion of this honourable Committee," was the reply. " If you tell me this Committee has so decided, I am reluctant to depart from their view, but, in my opinion, they were wrong," rejoined Palles, who thenceforward assumed control of the proceedings and largely influenced the conclusions of the Board.

When I asked Mr. Delany for the title of this case, unfortunately omitted from his book, and on what authority his interesting account of it is based, he told me that he had it at one remove from Frank Kennedy, the Chief Baron's Associate who was with him in London at the time.

Many lawyers will be disappointed that a book devoted to a man " who lived in the law and whose decisions are his best memorial " should contain so little law. But to do more than Mr. Delany has done in Chapter XV, " *The Legacy of Christopher Palles*," would have resulted in a much larger book, necessarily more expensive, and finding fewer purchasers. The one case which he treats at some length is *Quinn* v. *Leathem*, which began as an action at the Belfast Summer Assizes in 1896, successfully brought by Leathem, a butcher at Lisburn, against Craig, Quinn and others, members of a butchers' assistants' trade union. The defendants took an appeal to the Irish Queen's Bench Division, in which four judges sat, including Palles, and thence to the Irish Court of Appeal, with four judges sitting. Both hearings are reported in [1899] 2 I.R. at pp. 667 and 744. All judges except Palles were in the plaintiff's favour, and the defendants with the exception of Quinn rested there. But Quinn went stubbornly on to the House of Lords, and again failed, Lords Halsbury, Macnaghten, Shand, Brampton, Robertson and Lindley being unanimously against him. Thus Palles stood alone against fourteen, but he earned a reference by Lord Halsbury to his " inflexible logic " and to the respect which any view of his was entitled to command. His standard of inflexibility in this case is evidenced by the fact that he began his judgment with a statement that he regretted feeling himelf " coerced by the judgment of the House of Lords in *Allen* v. *Flood* [1898] A.C. 1 to hold that the law is powerless to protect, from that which the jury has found to be the tyranny of a trade union, the sacred right of a workman to save himself and his family from starvation by the work of his hands."

Ten years later Palles took the " soft " view in *Cooke* v. *Midland Great Western Railway of Ireland*. The plaintiff, a boy of four, recovered damages for personal injuries in an action tried by Lord O'Brien L.C.J. and a special jury. The defendants moved in the King's Bench Division of Ireland that the findings, verdict and judgment be set aside. The court (Kenny J., Johnson J. and Palles C.B.) held, with the dissent of Kenny J., that the verdict and judgment should stand. The Irish Court of Appeal (Sir Samuel Walker L.C., FitzGibbon and Holmes L.JJ.) allowed an appeal

[1908] 2 I.R. 270. The House of Lords (Lords Macnaghten, Atkinson, Collins and Loreburn L.C.) unanimously reversed the Court of Appeal and restored the decision of the Chief Baron and the King's Bench Division ([1909] A.C. 229). But the conclusion of Palles and the Lords came into collision with the logic, as inflexible as Palles' own, of Thomas Beven, a most acute and learned lawyer, who was never a judge. He attacked the decision with ferocity in a pamphlet which I owned fifty years ago, but have lost. It is reprinted in the fourth edition (1928) of Volume I of Beven's great work on *Negligence*, at pages 188 to 241, with the omission of certain passages which the editors regarded as " either wantonly offensive or not really necessary." Incidentally, Mr. Delany tells me that Cooke was living, in about 1947, in Navan, County Meath, and was actually employed by the defendant company.

While commending most warmly Mr. Delany's fascinating book, which not only gives us a glimpse of an almost mythical hero, but also tells much, unknown to many of us, about the Irish judiciary, and about forgotten battles concerning Irish University education, I must in fairness add that there is room for improvement in its style. And the final reading by the author and his friends has let slip through the transposition of the names of the parties to one of the cases tried by Palles on his last circuit, of which an account is given on pages 148 to 151.

I suggest, in conclusion, that Mr. Delany should place us further in his debt by publishing as a companion volume a selection of Palles's judgments, with a note in each case of the facts and the eventual decision. And to such a volume might be added an analysis of the great Chief Baron's approach to judicial problems.

H. A. Hollond.

Justices of the Peace, 1361–1848. A History of the Justices of the Peace for the Counties of England. By Bertram Osborne. [Shaftesbury, Dorset: The Sedgehill Press. 1960. 248 and (index) 6 pp. 26s. net.]

Mr. Osborne's book has received the distinction of a four-page review in the *Law Quarterly Review* of January this year, from the pen of Sir Carleton Allen. I mention this for the benefit of those who may desire fuller details than I am able to give in my necessarily much briefer account of it.

It seems probable that the author had in mind the general public rather than the law student, for there is no mention of any teacher of legal history among those whose help is acknowledged. For the general reader the book is excellent; I respectfully endorse Sir Carleton's commendation. But it will also be useful to the law student for arm-chair reading. If, as I hope, a second edition is called for, some of my few suggestions may be worth consideration.

As the book purports to deal with the years 1361 to 1848 a

chapter of seven pages is quite inadequate to the first period of over two hundred years, especially as Professor Bertha Putnam's research has made so much knowledge of that period available. I have found no mention of her distinguished work, nor indeed any reference to Holdsworth. A serious student should turn to the index to Holdsworth's *History*: he will also find in Professor Chrimes's Introduction to the seventh edition of Volume I the appropriate references to Putnam.

In the section on the Tudors one misses the name of Sir Anthony Fitzherbert, the earliest, and the greatest, lawyer who wrote fully about Justices of the Peace. Besides being possibly the author of a tract published anonymously in 1510, he wrote the well-known book published in 1538, the year of his death. Another fact which might well be mentioned is that there was already in Tudor times a great deal of law as to what sorts of cases could be dealt with out of sessions by a single justice and what sorts by two or more justices. This appears both in Lambard's book, mentioned by Mr. Osborne on page 83, which was published in 1581, and also in the enlarged edition of Fitzherbert's book which Crompton published two years later.

Mr. Osborne, in the same part of his book, gives us a page about the " quorum." His statement that " this little cadre of Justices skilled in the law were named in every Commission as of the quorum " does not adequately inform the inexperienced reader. The latter would not realise either that commissions were in Latin, or how it came about that the word " quorum " was used in a sense quite different both from its Latin and from its eventual English meaning.

Part II of the book, not far from half of the whole, dealing with the years 1603–1688, is perhaps the most valuable. It contains a great deal of information which it would be laborious to find elsewhere. It is, for instance, little known that under the authority of two Acts of James I (1608 and 1623), respectively making drunkenness and swearing punishable, a justice who saw anyone drunk or heard anyone swear could act " on his own view " and at once collect the fine or summon the constable to inflict punishment. In this period petty constables were becoming, more definitely than they had been, the minions of the justices. Many of the courts known as leets, whose duty it was to appoint petty constables, were falling into disuse: when the leet failed to appoint, the justices used to do so. Mr. Osborne refers to Hampshire in this connection (p. 87). He does not mention the statute 13 & 14 Car. 2, c. 12 (cited by Holdsworth in Vol. IV at p. 124), which enacted that where a leet was not held two justices in or out of quarter sessions should appoint.

We are informed (p. 114) of a little known Marriage Ordinance of 1653 imposing a surprising duty on justices. After publication of particulars either in the parish church on three Sundays or in the

market place on three market days the parties were to go before some Justice of the Peace, who should examine them, and, if there should appear no cause to the contrary, should marry them in the prescribed form.

The activities of justices during the years 1688 to 1848 are better known: well-selected examples of them are given in Part III. The terminus is the year in which the statutes promoted by Sir John Jervis, as Attorney-General, were enacted. By an odd oversight—it can hardly have been design—Mr. Osborne does not mention his name. The text suggests that Lord John Russell's government deserves more credit for this legislation than I believe to have been its due. My reading of Jervis's speech as a whole is that it was a public-spirited enterprise of his own.

Apart from the fact that Mr. Osborne's book is concerned with the county justices only, the description of it on the dust-cover as a history of our magistracy is an exaggeration. It is a collection of gleanings in a vast field. But as such it is of absorbing interest and will be of permanent value, bringing pleasure and profit to all its readers.

H. A. Hollond.

Pension Book of Clement's Inn. Edited, with an introduction by Sir Cecil Carr, K.C.B., Q.C., F.B.A. Publications of the Selden Society, Vol. 78. [London: Bernard Quaritch, for the Selden Society. 1960. lxvii, 310 and (indexes) 37 pp. £3 13s. 6d. net.]

Sir Cecil Carr has a long editorial connection with the Selden Society, for the Society's volume, No. 28 for the year 1913, contains a detailed account by him of the historical development of the use of charters of incorporation in the field of trade and commerce. In the present volume he now gives us (happily enough during his presidency of the Society) a view of a rather different form of group activity. From the varieties of commercial incorporation over a long period of time we turn to a single, unincorporated, professional society, as seen through a few surviving records, namely, one of the Inns of Chancery, Clement's Inn.

Nevertheless it would be incorrect to imply that Sir Cecil in his edition of a Pension Book of the Inn covering the years 1714–1749 has taken a narrow view. True it is that the Pension Book itself often chronicles small beer. But this must be so of the domestic records of such societies. The minute books of a Cambridge college might present the same problems to a historian seeking to relate the affairs of the society to matters of general public concern. Nor is the minute investigation of such details to be despised. As the editor reminded the Selden Society in a recent presidential address, Maitland once devoted part of a long vacation to " counting the hides in Domesday." Further, the text of the Pension Book is

buttressed by other documents and lists giving details of the Inn's constitutions and orders and the names of members admitted year by year from 1636 to 1883.

In his full introduction the editor enters into a wide-ranging review of the place and function of the lesser legal *hospicia*, the Inns of Chancery. It is not too much to say that these Inns, which in their later days declined and perished so miserably, have received too little attention from scholars. Some few fragments of their history have been salvaged *e.g.*, Mr. D. S. Bland's publication of some early records of Furnival's Inn (allied to Lincoln's Inn, as Clement's Inn was allied to the Inner Temple). The work of Professor Thorne on the early readings and educational work of the Inns of Court is throwing increasing light on the early history of the Inns generally. Nevertheless, Sir Cecil's work takes us down comparatively unlighted and untrodden paths. How tantalising is Fortescue's account of the Inns! He writes enough to make it evident that he might have said so much more on points where information is now quite lacking.

Though much remains obscure, the introduction to this volume is a very thorough exploration. The very physical features of the Inn are re-created for us; the incidents of daily life, and even the chimes at midnight, bring touches of colour and clamour to the scene. If Justice Shallow's reminiscences come anywhere near accuracy, life at the Inn was not dull. ("I was once of Clement's Inn, where, I think, they will talk of mad Shallow yet.") Across this scene Sir Cecil has drawn the patterns of the society's activity in legal education, the relationships of the greater and lesser Inns and the curious story of the segregation of the two branches of the legal profession. Throughout incidental points of fundamental interest occur. Thus the Inns held their property as *cestuis que trust*. How did they get along without the legal advantages of incorporation, *e.g.*, perpetual succession, capacity to hold land, contract, etc.? This volume gives the answers to these questions and to many others besides.

D. E. C. Yale.

Williams on Executors and Administrators. Fourteenth Edition. By George William Keeton, m.a., ll.d., of Gray's Inn, Barrister-at-Law, Professor of English Law, University of London, assisted by Ernest Harold Scamell, ll.m., of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1960. In two volumes, ccxliii, 1216 and (index) 128 pp. £12 12s. net (£10 10s. if 13th edition is returned with order).]

The first edition of this famous treatise, commonly known as *Williams on Executors*, appeared nearly a hundred and thirty years ago. During the next forty years the author, Sir Edward Vaughan Williams (from 1846 a judge of the Court of Common Pleas), produced six further editions, the last of them with a co-editor; and

the past eighty years or so have seen seven more editions, bearing various distinguished names. This is a treatise, therefore, which has seen many changes in the law, ranging from the Wills Act to the Property Acts and beyond. And so, over many years, its learned editors have had the problem of modifying it: reducing the old law and incorporating the new. Although Sir Edward modestly forebore to write an initial preface, he presumably intended his treatise to be used primarily as a practitioners' book; and that is its undoubted status today.

It is a substantial treatise. Now, as in 1832, it occupies two volumes and over twelve hundred pages of text—though its modern pages have become rather larger. On the whole, moreover, the original plan of the book has persisted. It is divided still into five main parts (the appointment of executors and administrators; their estate; their powers and duties; their liabilities; actions by or against them); and nowadays there is also a sixth part comprising four pages on registered land. Most of its constituent chapters, likewise, bear titles corresponding to the originals. On the other hand, there are signs that the original book was intended to include the whole of the law of wills, whereas its modern editions are inclined to assume that the elements of that subject are known: thus the original edition, before approaching executors, began with six chapters on will-making and revocation and the like, which are nowadays omitted. The original book, moreover, was able to pursue an almost leisurely style: now and then, for instance, its text would quote from a judgment. But nowadays the authorities are so many and the field so wide that brevity and compression have become essential, and one feels grateful even for quotations from rules and statutes—*cf.* p. 180 where one is referred to " the books of practice." Now and then, of course, as when dealing with grants, its pages read somewhat austerely. But there is lighter, more seductive, reading elsewhere: *e.g.*, in the chapters on Evidence in Testamentary Causes; the devolution of Chattels Personal (" animate, vegetable, and inanimate "—including fixtures); Married Women; and Gifts Mortis Causa. Moreover, its ninety-six chapters average only twelve pages apiece and so are relatively short—a quality which somehow encourages a reader to read further.

Part III, on the personal representative's powers and duties, remains the largest section of the book and now (with its forty-six chapters) occupies nearly one-half of it. It includes a chapter on charitable gifts, several on construction, one on lapse, one on Family Provision, and four on intestacy (including intestates domiciled abroad). And of course much is said of the Property Acts, including the Trustee Act, though the new Variation of Trusts Act is barely mentioned. The seven chapters of Part IV (the representative's liabilities) begin with the assets and the distribution of solvent estates, before proceeding to the representative's liability for the deceased's acts and for his own. Thus there is, even in the

framework of the book, a certain novelty of approach, inherited from Sir Edward; and the like is often evident in its text, as where the exposition of a topic begins with some apt words of his by way of background or introduction to the modern law. In readability also, and even in the shades of emphasis dictated by the brevity now required of it, much of the book retains a freshness and vigour which, in view of its age and the changes it has suffered, are at once surprising and commendable. But the editor of a book having such qualities as these must tread warily: for they are easily lost. And that, we may suppose, is one of the reasons which led Professor Keeton, the editor of this new edition, wisely to decide that " although the time for a large-scale reorganisation may be approaching, it has not yet arrived."

The work of revision done for this edition (see Preface) brings the law " in general " up to October 1, 1959: a date too early, we are told, for justice to be done to the Variation of Trusts Act—contrast the former (1953) edition wherein a similar difficulty caused by the Intestates' Estates Act, 1952, was met by preface and appendix. Some twenty-five recent statutes (ending with the Legitimacy Act, 1959) are indexed in the Table of Statutes; and some two hundred and forty new cases appear in the Table of Cases. Here a few minor errors have been observed: *e.g.*, *Day* (or *Davy*?) v. *Smith*; *Delgoffe* v. *Fader*: *In the estate of Gallop*; *Re Manners decd.* (1955); moreover *R.C.S.* v. *N.P.B.* lacks its A.C. reference, both in Table and in footnotes, and for p. 877, *Acheson* v. *Russell* ([1951] Ch.) is indexed only *s.t. Re Manor Farm* ([1950] All E.R.). Besides the new statutes and cases there was also the heavy task of incorporating the Non-Contentious Probate Rules of 1954, which had revoked and replaced with amendments the many previous rules and instructions governing non-contentious probate business. There has also been some " pruning of dead wood " and some slight extensions of certain topics. But the net result, though increasing the preliminary Tables and (by one page) the substantial Index, is a text a few pages shorter than before.

Finally, your reviewer should perhaps confess that he approached his task knowing little of this book (apart from an occasional hurried reference to it) and inclined to doubt the usefulness of perpetuating a work which, having lived so long, has necessarily changed so much. Now, having read a substantial part of it and dipped elsewhere, he doubts no more.

S. J. Bailey.

Preston and Newsom's Covenants Affecting Freehold Land. Third Edition. By G. H. Newsom, Q.C., of Lincoln's Inn. [London: Sweet & Maxwell, Ltd. 1960. xxix, 263 and (index) 11 pp. £3 3s. net.]

The main feature of the latest edition of this valuable work is the

considerable expansion of Chapter 7, which deals with the jurisdiction of the Lands Tribunal to discharge or modify restrictions, and now represents more than one-third of the book. The Excursuses on covenants against subsidence, covenants for the benefit of trade, and covenants binding chattels have been omitted from this edition.

The book is a great help in elucidating this somewhat difficult branch of the law of real property, and the suggestions here offered are without exception of minor importance. Reference is made to criticism of *Re Ballard* [1937] Ch. 473 (21). It would seem appropriate to mention the main critic, Radcliffe in (1947) 57 L.Q.R. 203. As to schemes of development, it is said that the common vendor is in no position to enforce after he has sold all his land (34). Reference might be made to the contrary view of Bailey in 6 C.L.J. 339, 356, n. 2. On the same page, there is an indication that in such a scheme the covenants must be identical. Any such false impression is later removed (77), but a reference to the clear exposition of Kekewich J. in *Collins* v. *Castle* (1887) 36 Ch.D. 243, 253, would be of value. This case, referred to in another context, has been omitted from the index.

Mr. Newsom suggests that the observations of the Court of Appeal in *Austerberry* v. *Oldham Corporation* (1885) 29 Ch.D. 750 to the effect that the burden of a positive covenant does not run with the land, were *ratio decidendi* (45). This argument would be recognised as unanswerable were reference made to the decision of the House of Lords in *Jacobs* v. *L.C.C.* [1950] A.C. 361, 368, dutifully followed by the Court of Appeal in *Cane* v. *Royal College of Music* [1961] 2 All E.R. 12, 24, where it was held that if a decision rests upon two alternate grounds both are *ratio decidendi*. The same House of Lords decision also falsifies the author's view that the approval in *Sobey* v. *Sainsbury* [1913] 2 Ch. 513 of *Knight* v. *Simmonds* [1896] 2 Ch. 294, that a change in the character of the neighbourhood which cannot be attributed to the covenantee or his successors in title may yet discharge a covenant, was a mere dictum (129).

It is said that a purchaser is affected by notice of matters of which his solicitor or agent has knowledge, but this is only if the knowledge is acquired in the same transaction: Section 3, Conveyancing Act, 1882, now section 199 (1) (ii) (*b*), Law of Property Act, 1925 (57).

Mr. Newsom argues that restrictive covenants are destroyed if the benefited and burdened land become vested in one person (53). It might be mentioned that this actually happened in *Elliston* v. *Reacher* so far as the plaintiffs other than Elliston were concerned, though the covenant was held to be discharged on another ground, that of implied release, as the covenant exacted after the merger was narrower in scope, and no longer forbade hotels but only beerhouses [1908] 2 Ch. 393–395. (In this report at p. 394, l. 5, for "lot 25" read "lot 26": see 77 L.J.Ch. 621, col. 1, l. 18.)

In the section on injunctions, it is categorically asserted that the refusal of the Court of Appeal in *Gaskin* v. *Balls* (1879) 13 Ch.D. 324 to grant an injunction regarding the bakehouse was due to the plaintiff's acquiescence (127), whereas eighteen pages earlier this is suggested only tentatively.

Re Cox and Neve [1891] 2 Ch. 109 is introduced on p. 133, and should again be inserted in n. 2, p. 135.

Mr. Newsom says in the preface that at the request of reviewers case names and references have been relegated from the text to footnotes. At p. 118, l. 2, this has been done without regard to the sense of what follows.

Mr. Newsom objects to a lax practice that has grown up of allowing expert witnesses before the Lands Tribunal to take their proofs of evidence with them into the witness-box (235). This is a surprising comment from a member of the Chancery Bar accustomed to affidavit evidence. Many criminal courts allow police officers to refer to their notebooks, and within reason this is legitimate, at any rate to refresh memory. In a criminal cause, the rules of evidence must clearly be adhered to strictly, but in the case of Tribunal procedure this is not so obvious. It is to be hoped that in the next edition Mr. Newsom will elaborate this point from his great experience of this type of procedure.

R. N. Gooderson.

An Outline of Planning Law. Third Edition. By Desmond Heap, LL.M., P.P.T.P.I., Comptroller and City Solicitor in the Corporation of London. [London: Sweet & Maxwell, Ltd. 1960. xxvii and 213 pp. 25s. net.]

A Guide to Compulsory Purchase and Compensation. Fourth Edition. By R. D. Stewart-Brown, Q.C., M.A. [London: Sweet & Maxwell, Ltd. 1960. xviii and 135 pp. 25s. net.]

New editions of these introductory works are called for principally by the Town and Country Planning Act, 1959, which has carried the dismantling of the 1947 Act's financial structure a stage further by restoring, in cases of compensation for public acquisition of land, the basis of open market value to a willing seller. Although it may be true, as Mr. Stewart-Brown remarks, that " many of the artificial conceptions introduced in the post-war period have thus been swept away for the future," the basis of open market value, first generally enacted in 1919, needs considerable amplification today to take account of the extent to which present land-values depend on planning. When land is acquired for a public purpose, what planning permission should be assumed for the purposes of assessing the " open market value," when the public need for the land almost certainly means that permission for private development has been refused? Many new artificialities have been introduced by the 1959

Act in the attempt to answer this fundamental, and difficult, question. Mr. Stewart-Brown recognises that the assumptions to be made for land in an area of comprehensive development are artificial: but the same criticism could be made of the " certificate of appropriate alternative development," and of the procedure whereby further compensation may become payable if, within five years of the purchase, land bought for one public purpose is appropriated to another public purpose: does this subsequent appropriation really affect the market value to the owner at the time of the original sale?

Although other criticism could be made of the present compromise on compensation under which an owner may be better off financially if his land is compulsorily acquired than if planning permission is refused him, it is a reviewer's function to examine the success with which the new editions have incorporated the latest legislation. In this respect it is difficult to fault the *Outline of Planning Law*: the text (only seven pages longer than in the previous edition) has been thoroughly and intelligently revised. The new material includes not only the 1959 Act, but also a useful section on the Town Development Act, 1952, and a summary (based on the Bill as it left the House of Commons) of the welcome amendments to the 1947 enforcement procedure made by the Caravan Sites and Control of Development Act, 1960. The deletions necessary to make room for all this are approved, but from the next edition there could also disappear the references in Chapter 14 to the 1946 Act's " speedy procedure " for acquisition which has long been obsolete.

The *Guide to Compulsory Purchase and Compensation* suffers by comparison with the *Outline*. The subject is admittedly a difficult one, in the present condition of the statutes, but the author does not allow himself space in a text of 104 pages for the necessary exposition. To give two examples only, the treatment of the " six rules " of 1919 is brief to the extreme, particularly since they have regained importance under the 1959 Act; and the rules of compensation for unfit houses are not given a comprehensive explanation. In the previous edition, the exposition of the financial provisions of the 1954 Act was not particularly clear, and the method adopted of working in the 1959 Act makes the present edition even less satisfactory. Instead of a revision of the whole text, a new section on the post-1959 position is followed by a reprinting of the sections dealing with compensation before 1959, with only their headings amended to show to which period they relate. Although warning is given that this method has been adopted, it necessarily means duplication and may lead to confusion; for example, the use of the present tense on page 81 suggests that the procedure under section 33 of the 1954 Act is still effective.

Eventually it may be possible for the effect of the 1947 and 1954 Acts on compensation for compulsory acquisition to be put aside and forgotten, but for the present one feels that the story must be

told in historical sequence. From this point of view, and as a clear introduction to the successive legislative amendments of compensation, Chapter 15 of Mr. Heap's *Outline* is strongly to be preferred for a first reading before the relevant section in the *Guide* is attempted.

A. W. Bradley.

Encyclopedia of the Law of Town and Country Planning. General editor: Desmond Heap, ll.m., p.p.t.p.i. [London: Sweet & Maxwell, Ltd. 1959. Two volumes. £10 10s. net. Supplementary service: £3 3s. p.a.]

Encyclopedia of the Law of Compulsory Purchase and Compensation. General editor: R. D. Stewart-Brown, q.c., m.a. [London: Sweet & Maxwell, Ltd. 1960. One volume. £5 5s. net. Supplementary service: £2 2s. p.a.]

These two encyclopedias appear in the series "The Local Government Library" and are successors to the former *Encyclopedia of the Law of Planning, Compulsory Purchase and Compensation* first published in 1949. They are to be unreservedly recommended as comprehensive works of reference. Both are in loose-leaf form, and the publishers provide a supplementary service of two or three releases each year for each one: in no other way does it seem possible to cope with the incessant flow of legislation which in this field is such as to make a conventionally bound book out of date almost before the book is published.

By their very structure, the encyclopedias illustrate the mechanism of government today in a complex field. A general statement of law, closely based on the introductory works by the respective General Editors (reviewed above), appears in each, to be followed in the *Planning Encyclopedia* by a formidable block of 899 pages of statutes, including both text and annotation. The next section, 313 pages of statutory instruments, indicates that delegated legislation is nowhere more essential than in town planning if Parliament is to achieve a social and economic revolution. Part IV is devoted to Ministerial Circulars, "administrative quasi-legislation," by which the Minister responsible for securing a national policy with respect to the use and development of land informs local planning authorities how he intends to perform his statutory duty. These Circulars are generally less accessible even than Statutory Instruments (at least to the private practitioner) but they are more intelligible and probably quite as influential. The administrative lawyer should know that Circulars 9/58, 38/58, 43/58 and 51/58, the ministerial aftermath of the Franks Report, are here reprinted in full. Finally, in the *Planning Encyclopedia*, there are printed the Ministry's Bulletins of Selected Appeal Decisions and a digest of planning decisions by Mr. Harold J. J.

Brown, which give some idea of the latest state of the Minister's mind as revealed in his recent decisions on particular planning appeals.

The *Encyclopedia of Compulsory Purchase*, based on a similar structure, is no less useful. The sight of 100 pages devoted to the Lands Clauses Consolidation Act, 1845, raises the question of when we may expect a full-scale statutory revision of this branch of the law. This revision is long overdue, and if it would give rise to some knotty problems (*e.g.*, should section 68 of the 1845 Act be re-enacted in the light of judicial interpretation to give a general right to compensation for the exercise of statutory powers?), then at least let obsolete sections be repealed. Will any case of disputed compensation ever again be settled by a sheriff's jury of twelve indifferent persons? It is disappointing that the opportunity of clearing the nineteenth-century jungle offered recently by the consolidating Land Compensation Act, 1961, was not taken.

One omission from the *Encyclopedia of Compulsory Purchase* is a summary, in tabular form, of the various powers of compulsory purchase now available to local and other public authorities under general legislation. It would be difficult, but surely not impossible, to compile such a summary, and it would make the *Encyclopedia* even more desirable for officers of local authorities, who are frequently called on at short notice to advise whether powers of compulsory purchase exist for a particular purpose.

Although the economically-minded purchaser may be critical that most of the Planning Acts are also reprinted in the Compulsory Purchase volume, this duplication emphasises that it is now unreal to consider town planning and compulsory purchase as distinct branches of the law: both are concerned with the best use of a limited quantity of land in the interests of the community; and in this both give rise to problems of compensation for the individual owner which have not yet received final solution.

A. W. Bradley.

Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland. Volume II. By Clive Parry, ll.d., of Gray's Inn, Barrister-at-Law, Fellow of Downing College. [London: Stevens & Sons, Ltd. 1960. xxiv, 256 and (index) 5 pp. £4 4s. net.]

This substantial volume bears witness to the difficulty of keeping in touch with the development of the constitutional laws of the Commonwealth. Dr. Clive Parry's first volume, when published in 1957, was a comprehensive treatise on the nationality laws of the Commonwealth. This second volume, which brings the material up to the beginning of 1960, contains some 260 pages and relates mainly to the Federation of Malaya, Singapore, Ghana and the Federation of Rhodesia and Nyasaland, and includes the British Nationality

Act, 1958. That may be described as the second round of constitutional development in the post-war period. We are now near the end of the third round. Nigeria, Cyprus and Sierra Leone have become independent countries, the Union of South Africa has left the Commonwealth (though South African citizens are, for the time being, British subjects), the fate of Rhodesia and Nyasaland is in the balance, Tanganyika will be independent before the end of the year, and there have been discussions about the federation of East Africa. Probably we shall soon need a third volume, and then perhaps a fourth.

The present volume follows the lines of the first volume and is indeed an addendum to it with some small corrigenda. Dr. Parry's explanations, and his comments on the legislative enactments, exhibit the same caution and lucidity as in the first volume. The price, for which he was not responsible, seems stiff.

W. Ivor Jennings.

Expropriation in Public International Law. By Professor B. A. Wortley, o.b.e., ll.d. Cambridge Studies in International and Comparative Law. [Cambridge U.P. 1959. xviii and 169 pp. 30s. net.]

Expropriation in international law is but an aspect of the general problem of State Responsibility. This subject has produced a richer case law probably than any other branch of public international law and the literature dealing with it is of formidable proportions. Yet it remains a shifting and elusive problem with doubts and uncertainties at every turn. It was upon this rock that the Hague Codification Conference of 1930 foundered. The International Law Commission, after having the matter on its agenda for some years and having discussed no less than five reports from its rapporteur has found even the basic principles so fiercely controversial that adjournment to some more tractable topic seems to be the likeliest outcome. With such a problem the most profitable line of further advance is often simply to return to the elements to try at least to get their outlines clear once more. This is precisely what Professor Wortley has done at the outset in this study of expropriation. In his first chapter he deals with the basic concepts involved: ownership, sovereignty and expropriation. Next there is a chapter on the "classical" notion of expropriation accompanied by adequate compensation. Then follows a discussion of the differences and the relationship between expropriation and other exercises of state sovereignty affecting alien property with which it has obvious but troublesome affinities: confiscation as a penalty for crime; taxation; exchange and currency controls; inflation and deflation; public health legislation; planning legislation; seizure under various heads in time of war or stress; and so on. There follow chapters setting out in brief historical outline the varying shifts and

manifestations of state practice in this important matter (it is a pity that the Suez Canal settlement came too late to be analysed in these pages). It is only when all this has been done that Professor Wortley allows himself to turn to the detailed analysis of the modern law and to the question of remedies. And here the author leaves us in no doubt what are his convictions. For him the institution of private property is an elemental human right of prime importance in the whole scheme of things. And the primary remedy for an interference with property is not even full compensation but restitution. " The Common Law notion that specific restitution is solely in the discretion of the court is explicable historically, but there is no need to import the same system into international law, since the Common Law system lessens the protection of a dispossessed owner and diminishes the meaning of ownership " (p. 102).

Whether so robust a position will in the long run find place in today's new and much changed community of nations is a question on which there may perhaps be room for more than one opinion. But the great merit of this book is, as it seems to this reviewer, that it enables the reader to see this whole problem both in context and in perspective. It is an elementary book in the best sense: it is an excellent book for the novice in the subject; but it is also one to which he may return for guidance in dark places after he has delved deep into the materials.

Having praised Professor Wortley's book for its treatment of the elements it would perhaps be unreasonable to criticise it for its brevity and its occasional failure to elaborate points that call for more extended treatment (to take only one example: the question of economic concessions, a subject of great difficulty in international law and very closely linked with the question of expropriation, has had to be dismissed in the space of about three pages). The reader, however, has the strong impression that the author is all the time under the necessity of scaling down his work to a relatively small compass; and indeed he indicates in the preface that some such process has taken place. It is true that the material on private international law problems which it was decided to omit can be found in Professor Wortley's Hague lectures of 1958; and other material will be found in a considerable number of monographs. But there must surely now be room for the bringing together of all his work, whether on the public or private international law or jurisprudential aspects of this question, into one large and comprehensive treatise. Professor Wortley has given us so to speak the handbook to the subject; could he not now bring together the fruits of his many years of labour on this subject into the complementary large-scale treatise?

R. Y. Jennings.

South Africa and the Rule of Law. Report of the International Commission of Jurists. With a Foreword by JEAN-FLAVIEN LALIVE, Secretary-General of the Commission. [Geneva: International Commission of Jurists. 1960. 92 and (appendices etc.) 147 pp. 7s. 6d. net.]

THIS Report was prepared by the legal staff of the International Commission of Jurists, after a visit to South Africa on behalf of the Commission by Mr. Elwyn Jones, Q.C., M.P., whose observations appear as Appendix A to the report. Use was also made, in compiling the Report, of South African statutes and law reports, the reports of parliamentary debates, publications of the South African Institute of Race Relations and of the South African Bureau of Racial Affairs, news reports in the South African press, and in general of the abundant literature dealing with *apartheid*.

The Rule of Law, as defined by the International Commission of Jurists, has the twofold aspect of protection from arbitrary government and the establishment of conditions (social, economic, educational, etc.) in which the dignity of the individual is respected and his legitimate aspirations may be realised (pp. 5–6). In the light of this ideal, and of those enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights, the Report analyses " the legislative, executive and judicial implementation of the policy of apartheid " (p. 19). *Apartheid* is examined in its impact upon marriage, education, employment and other spheres of life, and in each case the analysis is prefaced by one or more articles of the Universal Declaration of Human Rights. The implementation of *apartheid* thus appears as a kind of commentary upon the ideals of the Declaration. Indeed, what emerges very clearly is the ideological gulf between the Universal Declaration of Human Rights and the precepts of *apartheid*.

The authors of the Report have sifted a great quantity of material with care and thoroughness. Much of the legislation examined is of a complex nature, and for an adequate exposition of particular measures, such as the Group Areas Acts, the inquirer must look elsewhere; the authors of the Report are concerned only to show the policy and effects of such measures, and in this they succeed admirably.

That the Rule of Law has been trampled underfoot in South Africa is convincingly shown. This is not the only depressing truth to emerge from the Report. Thus it appears again and again that *apartheid* has been the traditional policy of South African, and previously of Colonial and Republican, governments for a considerable time. Its application has been intensified by the Nationalist Government with great speed and thoroughness, but the foundations of *apartheid* were laid long before 1948. Another fact of importance to emerge is the fundamentally economic and selfish purpose of much of the apparatus of *apartheid*. Thus, by means of the Pass

Laws, " the movement and residence of the African labour force is regulated to meet the industrial and agricultural requirements of the European " (p. 27). Africans are excluded from skilled jobs which " are regarded as the prerogative of Europeans " (p. 41). The education policy for the African places emphasis upon his role as manual labourer (pp. 76 *et seq.*).

In the opinion of this reviewer, it is the special value of the Report that it reveals something of the cost of *apartheid* in human suffering. The often skilful apologetics of the Union Government, the seeming anxiety for the welfare of the African or Coloured (not so much for that of the Indian) and for the preservation of his " own culture," throw a veil over the toll taken by *apartheid* of human security and happiness. Apart from some revealing glimpses through the veil afforded by the Report itself, Appendices D and E give a vivid picture of a recent and particularly ugly manifestation of *apartheid* in practice. These Appendices describe a government-sponsored system of farm labour whose victims, convicted of no crime, were tortured, starved and in some cases murdered. Although the events described resulted from administrative abuse and were checked by the courts, they represent the kind of abuse to which a system that is based upon the ideal of white supremacy is subject.

The Report reminds us that the policy of *apartheid* is applied in its full rigour in the mandated territory of South-West Africa.

The hope is expressed in the Report that the decline in free institutions and respect for human rights may yet be arrested by forces within the Union. This is certainly to be hoped for; but the Report itself reveals with disheartening clarity the determination and rigidity of the South African Government in implementing its policies, and its ruthlessness in destroying opposition to them.

The draft constitution for the Republic of South Africa, published in 1942, when many Nationalists hoped for a Nazi victory, and appearing as Appendix B, has not been adopted for the South African Republic. This draft constitution had, in truth, been overtaken by events.

C. C. Turpin.

Communications concerning articles and notes should be addressed to the Editor, Professor C. J. Hamson, Trinity College, Cambridge.

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